Genting Highlands Bhd & Ors v GM Aero Support Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22C-13–02 OF 2020
ALIZA SULAIMAN J
14 JANUARY 2022

Civil Procedure — Experts — Recusal — Application to recuse or remove court expert — Expert in geotechnical field — Whether court expert had violated Professional Engineering Practice and Etiquette Rules — Whether court expert was not familiar with approval process for development of project — Whether court expert had imposed unreasonable and/or excessive fees — Whether court expert acted unfairly and unjustly against defendants — Whether court expert had failed and/or refused to act as reasonable and fair-minded person which was expected of a court expert — Whether there was danger of bias — Whether there was unexplained delay by defendants in filing recusal application — Whether purported bias had been waived by delay, non-protestation and positive acts by defendants — Rules of Court 2012 O 32 r 12 & O 40 r 1

Civil Procedure — Injunction — Application for — Application for restraining injunction and mandatory injunction — Whether totality of facts disclosed bona fide serious issue to be tried — Whether damages would serve as adequate remedy if plaintiffs succeeded at trial of action — Whether balance of convenience in granting injunction in favour of plaintiffs — Whether there were any special factors

Civil Procedure — Time — Extension of — Application to extend time to carry out and complete works as required by ad interim injunction order — Whether there was failure to disclose — Whether there was omission or delay in carrying out works — Whether application for extension of time ought to be dismissed

The disputes herein were between the owners of adjoining lands whereby the defendants had commenced earthworks, excavations, piling, slope-cutting and construction works for the defendants' proposed project ('the alleged works') on its lands adjoining to the plaintiffs' lands which allegedly had caused damages to the plaintiffs' private road located on the plaintiffs' lands. In this case, there were three applications to be determined by the court: (a) the first and second defendants' application for an extension of time ('the EOT') to carry out and complete the works as stated in para (B) of the ad interim injunction order dated 28 February 2020 ('encl 65'); (b) the plaintiffs'

application for a restraining injunction and a mandatory injunction ('encl 4'); and (c) the defendants' application to remove or recuse the court expert, Ir Dr Ooi Teik Aun ('encl 228'). In respect of encl 65, the plaintiffs argued that there were failure and omission or delay by the defendants in carrying out works to stabilise the toe of the slopes and the defendants had also failed to disclose about the presence of the third bore hole, as such, the EOT application should be dismissed. In relation to the injunction application under encl 4, the test to be satisfied by the plaintiffs were: (i) whether the totality of facts of the case disclosed a bona fide serious issue to be tried; (ii) whether damages would serve as an adequate remedy if the plaintiffs succeeded at the trial of the action; (iii) the balance of convenience in granting the injunction sought; and (iv) whether there were any 'special factors'. As for encl 228, the issues raised were: (A) whether the court expert had violated the Professional Engineering Practice and Etiquette Rules in carrying out his responsibilities as a professional geotechnical engineer; (B) whether the court expert was not familiar with the approval process for the development of a project; (C) whether the court expert had imposed unreasonable and/or excessive fees; (D) whether the court expert had acted unfairly and unjustly against the defendants; (E) whether the court expert had failed and/or refused to act as a reasonable and fair-minded person which was expected of a court expert; (F) whether there was a danger of bias against the defendants that would cause serious prejudice and justice and equality would not be achieved; (G) whether there was unexplained delay on the part of the defendants in filing the recusal application; and (H) whether any purported bias had been waived by delay, non-protestation and positive acts by the defendants.

Held, dismissing encl 65 with costs of RM10,000 to be paid by the defendants to the plaintiffs subject to allocatur:

(1) It was trite law that the burden was on the applicant who sought an EOT to make available sufficient material upon which the court may exercise its discretion in his favour. Any person seeking the indulgence of the court under any rule or circumstance should make full, frank, candid and honest disclosures of all the relevant facts. Failure to do so could result in the court refusing to exercise its discretion in favour of the applicant. In the present case, the defendants had not been entirely candid in the averments in support of the EOT application and offered no explanation for their failure and omission or delay in carrying out the works to stabilise the toe of the slopes and with regards to the presence of the third bore hole. The first and second defendants had not presented a satisfactory case to merit favorable consideration of the application for leave and EOT to be granted to stabilise the toe of the slopes as per para (B)(a) in the ad interim injunction order (see paras 64 & 66–67).

Held, allowing encl 4 with costs of RM30,000 to be paid by the defendants to the plaintiffs subject to allocatur:

(1) The plaintiffs had raised valid serious issues to be tried surrounding the planning permission and approvals from Majlis Perbandaran Bentong, the legality of the alleged works and the stability of the slopes which could only be determined after full trial. Further, the plaintiffs had also established that there was a real and imminent danger of loss of the proper or sufficient vertical or lateral support to the plaintiffs' land. It was plainly obvious that this case involved issues of public safety and the need to safeguard human lives and properties from harm, damage or losses which could ensue if the alleged works were allowed to continue. This was an appropriate case for the usual undertaking as to damages to be dispensed with. In addition, the court agreed with the plaintiffs that the defendants' conduct, as discussed in the analysis of the issues in respect of the EOT application, would tilt the balance of convenience in favour of the grant of the injunction as prayed by the plaintiffs. The plaintiffs would suffer greater injustice if relief was withheld at this stage of the proceedings (see paras 87–89, 98–100 & 105).

(2) The court found that the threat of slope failure was real. The 5 November 2019 landslide was testament of the reality that a landslide could happen at any time, especially following heavy rainfall. The irreversible damage and injury to, not only the plaintiffs, but to members of the public and the surrounding infrastructure and environment if such an incident was to occur could not be understated. Even though the legal requirements to grant a mandatory injunction at the interlocutory stage was more stringent than that for a prohibitory injunction, the court was satisfied that a mandatory injunction should be granted in the circumstances of this case for the defendants to further strengthen the toe of the slopes on the terms and timelines as finally Ordered by the court (see paras 108–109).

Held, dismissing encl 228 with costs of RM8,000 to be paid by the defendants to the plaintiffs subject to allocatur:

(1) The contention of a violation of the Professional Engineering Practice and Etiquette Rules had been thrown in without any substantiation as the defendants did not even bother to state what rule was breached. How the rule was violated and when this occurred were never described in any of the affidavits. As for the issue of the court expert's understanding of the approval process, it was incontrovertible that he was appointed for his expertise in the geotechnical field. The request for copies of all the approvals by the authorities was well within the scope of tasks to enable the court expert to make a conclusion on whether the design on all geotechnical engineering works were in compliance with, among others, the statutory requirements. Further, it was the defendants' case that they

had obtained all requisite approvals for the entire proposed project, as such, it was reasonable for the court expert to request for documentation as proof of these approvals (see paras 119–121).

(2) The records showed that the court expert had corresponded with the solicitors for the plaintiffs and the defendants vide emails but there were no complaints or objections by the defendants that the fees as proposed by the court expert were excessive and unreasonable. Further, no evidence was adduced by the defendants as to the amount of fees which would constitute the 'usual norm of the industry'. In the upshot, the defendants had plainly accepted the rates of remunerations of the court expert and this ground was nothing but an attempt by the defendants to recant from the terms of appointment of Dr Ooi (see paras 132–133).

(3) The plaintiffs had presented persuasive arguments to support the submission that the role of the court expert was as prescribed under O 32 r 12 and O 40 r 1 of the Rules of Court 2012. The court expert was required to 'inquire and report upon' any question of fact or opinion and not involving questions of law. At this interlocutory stage of the proceedings, the defendants' belief of Dr Ooi's biasness and lack of independence did not justify an Order to recuse or remove Dr Ooi as the court expert. The court expert was obviously not an arbiter or a decision maker. The duty to adjudicate and adjudge the issues to be tried in this suit lay with the court. Therefore, the court found and held that the 'real danger of bias' test was not applicable to a court expert. In any event, the court also found that the defendants had failed to establish a real danger of bias on the part of the court expert (see paras 152–153 & 155).

(4) The defendants had many opportunities to raise the issue of bias but they did not. Instead, the defendants took positive steps opposite to the presence of any bias by the court expert. As a consequence of the unexplained delay, the non-protestation and the positive acts by the defendants, any bias on the part of the court expert, if it existed, had been waived by the defendants (see paras 159–160).

(5) The law mandated that a party raising an allegation of bias must show cogent evidence. Whimsical or bare imputations of bias were insufficient but this was exactly the scenario in this case. The recusal application was evidently based on unfounded inferences, conjecture, and suspicion. The court had no doubt whatsoever that Dr Ooi was aware of, and understood, the responsibilities that ensued from his appointment as the court expert. The recusal application was nothing but a baseless attack on the integrity of the court expert. Hence, the defendants' proposition that the scope of tasks was not to be adopted and performance of the same ought to be halted simply did not arise (see paras 162 & 164).

[Bahasa Malaysia summary

Pertikaian di sini adalah antara pemilik tanah bersebelahan di mana defendan-defendan telah memulakan kerja tanah, penggalian, cerucuk, pemotongan cerun dan kerja pembinaan untuk projek yang dicadangkan oleh defendan-defendan ('kerja-kerja tersebut') di atas tanahnya yang bersebelahan dengan tanah plaintif-plaintif yang didakwa telah menyebabkan kerosakan pada jalan persendirian plaintif-plaintif yang terletak di tanah plaintif-plaintif. Dalam kes ini, terdapat tiga permohonan yang akan ditentukan oleh mahkamah: (a) permohonan defendan pertama dan kedua untuk lanjutan masa ('EOT') untuk melaksanakan dan menyiapkan kerja-kerja seperti yang dinyatakan di para (B) perintah injunksi ad interim bertarikh 28 Februari 2020 ('lampiran 65'); (b) permohonan plaintif-plaintif bagi suatu injunksi sekatan dan injunksi mandatori ('lampiran 4'); dan (c) permohonan defendan-defendan untuk memecat atau mengecualikan pakar mahkamah, Ir Dr Ooi Teik Aun ('lampiran 228'). Berkenaan dengan lampiran 65, plaintif-plaintif berhujah bahawa terdapat kegagalan dan peninggalan atau kelewatan oleh defendan-defendan dalam menjalankan kerja-kerja untuk menstabilkan hujung cerun dan defendan-defendan juga gagal untuk mendedahkan tentang kehadiran lubang bor ketiga, oleh itu, permohonan EOT harus ditolak. Berhubung dengan permohonan injunksi di bawah lampiran 4, ujian yang perlu dipenuhi oleh plaintif-plaintif ialah: (i) sama ada keseluruhan fakta kes mendedahkan isu serius yang bona fide untuk dibicarakan; (ii) sama ada ganti rugi akan berfungsi sebagai remedi yang mencukupi jika plaintif-plaintif berjaya dalam perbicaraan tindakan tersebut; (iii) imbangan kemudahan dalam memberikan injunksi yang dimohon; dan (iv) sama ada terdapat apa-apa 'faktor khas'. Bagi lampiran 228, isu-isu yang dibangkitkan ialah: (A) sama ada pakar mahkamah telah melanggar Peraturan Amalan Kejuruteraan dan Etiket Profesional dalam menjalankan tanggungjawabnya sebagai seorang jurutera geoteknikal profesional; (B) sama ada pakar mahkamah tersebut tidak biasa dengan proses kelulusan bagi pembangunan sesuatu projek; (C) sama ada pakar mahkamah telah mengenakan bayaran yang tidak munasabah dan/atau berlebihan; (D) sama ada pakar mahkamah telah bertindak secara tidak adil dan saksama terhadap defendan-defendan; (E) sama ada pakar mahkamah telah gagal dan/atau enggan bertindak sebagai seorang yang munasabah dan berfikiran adil yang diharapkan daripada seorang pakar mahkamah; (F) sama ada terdapat bahaya berat sebelah terhadap defendan-defendan yang akan menyebabkan prasangka serius dan keadilan serta kesaksamaan tidak akan tercapai; (G) sama ada terdapat kelewatan yang tidak dapat dijelaskan di pihak defendan-defendan dalam memfailkan permohonan pengecualian; dan (H) sama ada apa-apa yang dikatakan berat sebelah telah diketepikan melalui kelewatan, ketiadaan bantahan dan tindakan positif oleh defendan-defendan.

Diputuskan, menolak lampiran 65 dengan kos sebanyak RM10,000 dibayar

oleh defendan-defendan kepada plaintif-plaintif tertakluk kepada alokatur:

(1) Sudah menjadi undang-undang yang mantap bahawa beban adalah ke atas pemohon yang memohon EOT untuk menyediakan bukti yang mencukupi yang membolehkan mahkamah menggunakan budi bicaranya untuk memihak kepadanya. Mana-mana orang yang memohon perintah mahkamah di bawah mana-mana peraturan atau keadaan hendaklah membuat pendedahan penuh, tidak berselindung, berterus terang dan jujur berkenaan semua fakta yang berkaitan. Kegagalan berbuat demikian boleh menyebabkan mahkamah enggan menggunakan budi bicaranya untuk memihak kepada pemohon. Dalam kes ini, defendan-defendan tidak sepenuhnya berterus terang dalam hujahan-hujahan untuk menyokong permohonan EOT dan tidak memberikan penjelasan untuk kegagalan dan peninggalan atau kelewatan mereka dalam menjalankan kerja-kerja untuk menstabilkan hujung cerun dan berkenaan dengan kehadiran lubang bor ketiga. Defendan pertama dan defendan kedua tidak membentangkan kes yang memuaskan untuk mendapatkan pertimbangan yang memihak kepada mereka berkenaan permohonan kebenaran dan EOT untuk dibenarkan bagi menstabilkan hujung cerun seperti di para (B)(a) dalam perintah injunksi ad interim (lihat perenggan 64 & 66–67).

Diputuskan, membenarkan lampiran 4 dengan kos sebanyak RM30,000 dibayar oleh defendan-defendan kepada plaintif-plaintif tertakluk kepada alokatur:

(1) Plaintif-plaintif telah membangkitkan isu serius yang sah untuk dibicarakan mengenai kebenaran merancang dan kelulusan daripada Majlis Perbandaran Bentong, kesahihan kerja-kerja yang didakwa dan kestabilan cerun yang hanya boleh ditentukan selepas perbicaraan penuh. Selanjutnya, plaintif-plaintif juga telah membuktikan bahawa terdapat bahaya yang nyata dan akan berlaku kehilangan sokongan menegak atau sokongan sisi yang sepatutnya atau mencukupi kepada tanah plaintif-plaintif. Jelas sekali bahawa kes ini melibatkan isu keselamatan awam dan keperluan untuk melindungi nyawa dan harta benda manusia daripada bahaya, kerosakan atau kerugian yang boleh berlaku jika kerja-kerja tersebut dibenarkan untuk diteruskan. Ini adalah kes yang sesuai untuk keperluan biasa mengenai ganti rugi diketepikan. Di samping itu, mahkamah bersetuju dengan plaintif-plaintif bahawa kelakuan defendan-defendan, seperti yang dibincangkan dalam analisis isu-isu berkenaan dengan permohonan EOT, akan menyebabkan imbangan kemudahan memihak kepada pemberian injunksi seperti yang diplidkan oleh plaintif-plaintif. Plaintif-plaintif akan mengalami ketidakadilan yang lebih besar jika relief yang dimohon tidak dibenarkan pada peringkat prosiding ini (lihat perenggan 87–89, 98–100 & 105).

(2) Mahkamah mendapati bahawa ancaman kegagalan cerun adalah nyata.

Tanah runtuh yang berlaku pada 5 November 2019 adalah bukti realiti bahawa tanah runtuh boleh berlaku pada bila-bila masa, terutamanya berikutan hujan lebat. Kerosakan dan kecederaan yang tidak dapat dipulihkan bukan sahaja terhadap plaintif-plaintif, tetapi kepada orang awam dan infrastruktur dan persekitaran sekeliling jika kejadian sedemikian berlaku tidak boleh diperkecilkan. Walaupun keperluan undang-undang untuk memberikan injunksi mandatori pada peringkat interlokutori adalah lebih ketat daripada injunksi larangan, mahkamah berpuas hati bahawa injunksi mandatori harus diberikan dalam keadaan kes ini untuk defendan-defendan mengukuhkan lagi hujung cerun tersebut berdasarkan terma-terma dan garis masa seperti yang diarahkan oleh mahkamah pada akhir kes (lihat perenggan 108–109).

Diputuskan, menolak lampiran 228 dengan kos sebanyak RM8,000 dibayar oleh defendan-defendan kepada plaintif-plaintif tertakluk kepada alokatur:

(1) Pertikaian mengenai pelanggaran Peraturan Amalan Kejuruteraan dan Etiket Profesional telah dilemparkan tanpa apa-apa bukti kerana defendan-defendan tidak peduli untuk menyatakan peraturan mana yang dilanggar. Bagaimana peraturan tersebut dilanggar dan bila ianya berlaku tidak pernah diterangkan dalam mana-mana afidavit. Bagi isu kefahaman pakar mahkamah mengenai proses kelulusan, tidak dapat dipertikaikan bahawa beliau dilantik atas kepakarannya dalam bidang geoteknikal. Permintaan untuk salinan semua kelulusan oleh pihak berkuasa adalah dalam skop tugas bagi membolehkan pakar mahkamah membuat kesimpulan sama ada reka bentuk pada semua kerja kejuruteraan geoteknikal mematuhi, antara lain, keperluan undang-undang. Selanjutnya, adalah kes defendan-defendan bahawa mereka telah memperoleh semua kelulusan yang diperlukan untuk keseluruhan projek yang dicadangkan, oleh itu, adalah munasabah untuk pakar mahkamah meminta dokumentasi sebagai bukti kelulusan ini (lihat perenggan 119–121).

(2) Rekod menunjukkan bahawa pakar mahkamah telah berhubung dengan peguam cara bagi plaintif-plaintif dan defendan-defendan melalui emel tetapi tiada aduan atau bantahan oleh defendan-defendan bahawa bayaran yang dicadangkan oleh pakar mahkamah tersebut adalah berlebihan dan tidak munasabah. Selanjutnya, tiada keterangan dikemukakan oleh defendan-defendan tentang jumlah yuran yang akan membentuk 'norma biasa industri'. Kesimpulannya, defendan-defendan telah menerima dengan jelas kadar bayaran pakar mahkamah dan alasan ini tidak lain hanyalah percubaan defendan-defendan untuk berpaling daripada syarat pelantikan Dr Ooi (lihat perenggan 132–133).

(3) Plaintif-plaintif telah mengemukakan hujah persuasif untuk menyokong hujahan bahawa peranan pakar mahkamah adalah seperti yang ditetapkan di bawah A 32 k 12 dan A 40 k 1 Kaedah-Kaedah Mahkamah

2012. Pakar mahkamah dikehendaki 'menyiasat dan melaporkan' apa-apa persoalan fakta atau pendapat dan tidak melibatkan soal undang-undang. Pada peringkat interlokutori prosiding ini, kepercayaan defendan-defendan terhadap sikap berat sebelah Dr Ooi dan ketiadaan kebebasan tidak mewajarkan perintah untuk pengecualian atau memecat Dr Ooi sebagai pakar mahkamah. Pakar mahkamah jelas bukan penimbang tara atau pembuat keputusan. Kewajipan untuk mengadili dan memutuskan isu-isu yang akan dibicarakan dalam saman ini terletak pada mahkamah. Oleh itu, mahkamah mendapati dan memutuskan bahawa ujian 'bahaya sebenar berat sebelah' tidak terpakai kepada pakar mahkamah. Walau apapun, mahkamah juga mendapati bahawa defendan-defendan telah gagal membuktikan terdapat bahaya berat sebelah yang nyata di pihak pakar mahkamah (lihat perenggan 152–153 & 155).

(4) Defendan-defendan mempunyai banyak peluang untuk membangkitkan isu berat sebelah tetapi mereka tidak melakukannya. Sebaliknya, defendan-defendan mengambil langkah positif bertentangan dengan kehadiran apa-apa yang berat sebelah oleh pakar mahkamah. Akibat daripada kelewatan yang tidak dijelaskan, ketiadaan bantahan dan tindakan positif oleh defendan-defendan, apa-apa yang berat sebelah di pihak pakar mahkamah, jika ada pun, telah diketepikan oleh defendan-defendan (lihat perenggan 159–160).

(5) Undang-undang memberi mandat bahawa pihak yang membangkitkan dakwaan berat sebelah mesti menunjukkan keterangan yang kukuh. Dakwaan yang mengikut hati atau dakwaan semata-mata berkenaan dengan berat sebelah tidak mencukupi tetapi inilah senario yang berlaku dalam kes ini. Permohonan pengecualian ini ternyata berdasarkan inferens, sangkaan dan syak wasangka yang tidak berasas. Mahkamah tidak mempunyai apa-apa keraguan pun bahawa Dr Ooi sedar, dan faham, tanggungjawab yang datang daripada pelantikannya sebagai pakar mahkamah. Permohonan pengecualian tersebut tidak lain hanyalah serangan tidak berasas terhadap integriti pakar mahkamah. Oleh itu, cadangan defendan-defendan bahawa skop tugas tersebut tidak boleh diterima pakai dan pelaksanaannya harus dihentikan adalah tidak timbul (lihat perenggan 162 & 164).]

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I *third party)* [2019] 8 MLJ 63, HC (refd)
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Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors [2000] 4 MLJ 200, HC (refd)
SV Beverages Holdings Sdn Bhd & Ors v Kickapoo (M) Sdn Bhd [2008] 4 MLJ 187; [2008] 3 AMR 408, CA (refd)
Tam Kam Cheong v Stephen Leong Kon Sang & Anor [1980] 1 MLJ 36, FC (refd)

Tan Siew Peng v OCBC Bank (M) Bhd [1998] 2 MLJ 420; [1998] 2 CLJ 684, CA (refd)
Timbermaster Timber Complex (Sabah) Sdn Bhd v Top Origin Sdn Bhd [2002] 1 MLJ 33; [2002] 1 CLJ 566, CA (refd)
Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd [1987] 2 MLJ 192, SC (refd)
Vakauta v Kelly [1989] 167 CLR 568, HC (refd)
White Burgess Langille Inman v Abbott and Haliburton Co 2015 SCC 23, SC (refd)
Zaidin Abd Ghani @ Zaidin Stothard v Raja Raman Nair @ Mohd Yusof & Ors [2001] MLJU 227; [2001] 3 AMR 3032, HC (refd)
Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd [1992] 2 MLJ 233; [1992] 3 CLJ 1539, SC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016)
Courts of Judicature Act 1964 Schedule, para 6
Earth Works (Bentong District Council) By-Laws 1998 by-law 5(4), Form B
Evidence Act 1950 ss 45, 46, 47, 48, 49, 50, 51
Planning Control (Development of Hill Land, High Land and Hill Side) (Pahang) Rules 2019 rr 3(1)(b), 5, 5(1)(a), (4), (4)(a), (4)(b)
Planning Control (General) Rules 1998 r 9(1), First Schedule, Form C(1)
Prevention and Control of Infectious Diseases Act 1988 s 11(2), First Schedule, Part I
Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) Order 2020
Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) (Extension of Operation) Order 2020
Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) (Extention of Operation) (No 2) Order 2020
Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) (Extension of Operation) (No 3) Order 2020
Prevention and Control of Infectious Diseases (Declaration Of Infected Local Areas) (Extension of Operation) (No 4) Order 2020
Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) (Extension of Operation) Order 2020
Prevention and Control of Infectious Diseases (Measures Within Infected Local Areas) Regulations 2020 reg 2, Schedule, item 22
Prevention and Control of Infectious Diseases (Measures Within Infected Local Areas) Regulations (No 2) 2020 regs 5, 7(2)
Rules of Court 2012 O 29, O 29 r 7, O 32 r 12, O 33, O 40, O40 r 1(1) O 59, O 59 rr 5, 7(1), 8, 16, O 92 r 4
Specific Relief Act 1950 Part III
Street, Drainage and Building Act 1974 ss 70, 70(1), (9), (9)(a), 70A, 70A(1), 117(3), 117(7),
Town and Country Planning Act 1976 ss 2, 2(1), 22(1), (2), (2)(aa), (3),

(4), (4)(aa), 23(1), 23(1)(b), 24, 24(1), (2), (3), (4), (5), 26 Uniform Building (Pahang) By-Laws 1996 by-laws 22(1), (2)

Teh Eng Lay (Ng Soon Kiat with him) (Cheah Teh & Su) for the plaintiffs.
Jasbeer Singh Kaura (Nur Hakimah bt Mohamad, Noor Syakirah bt Khalil and Rachel Maryanne Verghis with him) (Jasbeer, Nur & Lee) for the defendants.

Aliza Sulaiman J:

INTRODUCTION

[1] Since the filing of the suit by the plaintiffs against the defendants on 24 February 2020 to the time of writing of these grounds of judgment, 14 interlocutory applications have been filed by the parties, to be exact, nine by the plaintiffs and five by the defendants. Needless to say, this case is a classic example of a long, bitter and intense dispute by one group of parties on one hand against the proposed development of land by another group of parties located in close proximity to the former's properties.

[2] These grounds of judgment set out the full reasons of this court in relation to the following applications:

(a) the first defendant's ('D1') and the second defendant's ('D2') application in encl 65 dated 8 May 2020 ('EOT application') for an extension of time ('EOT') to carry out and complete the works as stated in para (B) of the ad interim injunction order dated 28 February 2020. The EOT application was heard on 25 June 2020, 19 March 2021 and 28 May 2021 and it was dismissed by the court on 31 May 2021 with costs of RM10,000 to be paid by the defendants to the plaintiffs, subject to allocatur;

(b) the plaintiffs' application in encl 4 dated 21 February 2020 for a restraining injunction and a mandatory injunction ('injunction application'). The injunction application was heard on 19 March 2021 and 28 May 2021 and it was allowed by the court on 31 May 2021 with costs of RM30,000, subject to allocatur; and

(c) the defendants' application in encl 228 dated 10 March 2021 ('recusal application') to remove or recuse the court expert, Ir Dr Ooi Teik Aun ('Dr Ooi'). The recusal application was heard on 30 June 2021 and it was dismissed by the court on 22 July 2021 with costs of RM8,000 to be paid forthwith by the defendants to the plaintiffs, subject to allocatur.

A SALIENT FACTS

[3] The salient background facts are gathered mainly from the amended statement of claim ('SOC') dated 30 March 2020 (encl 54), the amended statement of defence and counterclaim (encl 59) and the plaintiff's affidavit in support ('AIS') of the injunction application affirmed by Izwan bin Abdullah @ Loke Kok Sing, Senior Vice President of Development & Engineering of the second plaintiff ('P2') on 21 February 2020 (encls 5–27).

[4] The first plaintiff ('P1') is a company registered under the Companies Act 1965 (Act 125) with its registered address at 24th Floor, Wisma Genting, Jalan Sultan Ismail, 50250 Kuala Lumpur. The principal business of P1 is in the development, sale and rental of land, rental of apartment units at Gunung Ulu Kali (or more commonly known as Genting Highlands) and the undertaking of other property development project.

[5] P2 is a public listed company registered under Act 125 with the same registered address as P1. The principal business of P2 is in the integrated resort business at Genting Highlands with the principal activities in leisure and hospitality services which comprise gaming, hotels, food and beverage, theme parks, retail and entertainment attractions.

[6] The third plaintiff ('P3') is a company registered under Act 125 with the same registered address as afore stated. The principal business of P3 is in the tourist resort business at Genting Highlands with the principal activities in leisure and hospitality services which comprise hotel and amusement activities.

[7] P1 and P3 are wholly owned subsidiary companies of P2. The plaintiffs are members of the Genting Malaysia Group of Companies.

[8] D1 is a company registered under Act 125 with its registered address at L8–02, 8th Floor, Brem Mall, Off Jalan Kepong, 52000 Kuala Lumpur. The principal business of D1 is in property development.

[9] D2 is a public listed company registered under Act 125 with its registered address at Lot 4.03A, 4th Floor, Plaza Prima, 4 1/2 Miles Jalan Kelang Lama, 58200 Kuala Lumpur. The principal business of D2 is in investment holding, building construction and civil engineering contracting.

[10] The third defendant ('D3') is an individual practising as a consultant civil and structural consultant engineer under the name and style of Perunding Jutera at 152–2–9, Kompleks Maluri, Jalan Jejaka, Taman Maluri, 55100 Kuala Lumpur.

[11] The fourth defendant ('D4') is company registered under Act 125 with its registered address at No 10A, First Floor, Jalan SS2/67, Petaling Jaya, Selangor. The principal business of D4 is as consultant structural engineer and the provision of building plan design and structure related service and advice.

[12] The fifth defendant ('D5') is an individual practising as an architect under the name and style of YC Lee Architect at 39 Barrack Road, 34000 Taiping, Perak.

[13] The sixth defendant ('D6') is an individual practising as a town planning and development consultant under the name and style of Zahiruddin Town Planning Services at 33, Jalan Elektron U16/86, Denai Alam, Seksyen U16, 40160 Shah Alam, Selangor.

[14] P1 was the registered proprietor of the freehold land held under Geran No 1750, Lot 8757, Mukim Bentong, Daerah Bentong, Negeri Pahang ('Lot 8757'). Over the years Lot 8757 was subdivided into smaller pieces of lands with separate document of titles issued.

[15] From 1965 to 2005, P1 and subsequently, P2, constructed a series of private roads and road bridges (including the Genting Main Access Road, the Genting Outer Ring Road and the Chin Swee Bypass) ('private road') through Lot 8757 from Genting Sempah to the peak of Gunung Ulu Kali where the Genting Malaysia Group of Companies has carried out development since 1971 into the well-known holiday destination that it is today.

[16] The private road is maintained by P2 who is responsible for, and in possession of, the private road. According to the plaintiffs, the private road has been recognised by Majlis Perbandaran Bentong ('MPB') as belonging to P2 and P2's approval for the future use of and connection to the private road has always been required whenever a developer applies to the MPB.

[17] It is also a known fact that the Genting Skyway and Awana Skyway cable car systems were constructed in 1997 and 2016, respectively, to alleviate the growing traffic volume of the private road.

[18] P1 is additionally the registered proprietor of all the freehold lands held under:

(a) Geran No 3628, Lot 9574, Mukim Bentong, Daerah Bentong, Negeri Pahang ('Lot 9574') which was previously Plot 50A in Lot 8757;

(b) Geran No 3629, Lot 9575, Mukim Bentong, Daerah Bentong, Negeri Pahang ('Lot 9575') which was previously Plot 50B in Lot 8757; and

(c) Geran No 3623, Lot 9576, Mukim Bentong, Daerah Bentong, Negeri Pahang ('Lot 9576') which was previously Plot 50C in Lot 8757.

[19] P2 is the beneficial owner of Lot 9574, Lot 9575 and Lot 9576 and the registered proprietor of the land in Pajakan Negeri No 16181, Lot 17283, Mukim Bentong, Daerah Bentong, Negeri Pahang ('Lot 17283') which was previously Plot 50J in Lot 8757.

[20] By a lands tenancy agreement dated 9 January 2001, P2 tenanted Lot 9574, Lot 9575, Lot 9576 and Lot 17283 to P3. Thereafter, P3 constructed the First World Complex, which comprises the First World Hotel, Sky Avenue, indoor theme park, Arena of Stars and Genting International Convention Centre, on these lands.

[21] P2 and P3 then operated the First World Complex until today. P3 remains the tenant of Lot 9574, Lot 9575, Lot 9576 and Lot 17283.

[22] D1 is the registered proprietor of the lands held under:

(a) HS(D) 18599, PT24116, Mukim Bentong, Daerah Bentong, Pahang ('PT24116');

(b) HS(D) 18600, PT24117, Mukim Bentong, Daerah Bentong, Pahang ('PT24117');

(c) HS(D) 18601, PT24118, Mukim Bentong, Daerah Bentong, Pahang ('PT24118'); and

(d) HS(D) 18602, PT24119, Mukim Bentong, Daerah Bentong, Pahang ('PT24119').

These four lots of land were formerly the land held under HS(D) 10380, PT11203, Mukim Bentong, Daerah Bentong, Pahang and shall hereinafter be referred to collectively as 'D1's lands'.

[23] D1's lands are situated at the north-east boundary of Lot 9574. PT24117, PT24118 and PT24119 adjoin Lot 9574 along a 367m stretch of boundary on a slope. A substantial part of the landscape of D1's lands is a steep hillside.

[24] D1 and D2 are occupiers of D1's lands. D1 is the developer and D2 is the contractor of the proposed development project thereon called the Genting Sky City Project ('proposed project').

[25] D3 is the consultant civil engineer, D4 is the consultant structural engineer and D5 is the architect for the proposed project.

[26] D6 is the town planning and development consultant who had submitted the development proposal report (September 2019) for the proposed project to MPB to support D1's application for planning permission of the proposed project.

[27] The proposed project purportedly consists of ten blocks of buildings with three blocks of buildings for car parks as follows:

(a) Phase 1 — one block of 27-storey hotel and one block of 35-storey commercial suites, both located on a 11-storey building for car parks;

(b) Phase 2 — two blocks of 56-storey hotel and two blocks of 56-storey commercial suites, all located on a 21-storey building for car parks; and

(c) Phase 3 — two blocks of 56-storey hotel and two blocks of 56-storey commercial suites, all located on a 21-storey building for car parks.

[28] Phase 2 and Phase 3 of the proposed project are situated on PT24117, PT24118 and PT24119 at the slopes adjacent to the private road on Lot 9574 and at the north-east boundary of Lot 9574 ('slopes'). The slopes are said to be at a gradient ranging from 25° to 35° or more.

[29] The plaintiffs alleged that the defendants had commenced earthworks, excavations, piling and slope-cutting and construction works for the proposed project ('alleged works') in December 2019.

[30] The plaintiffs claimed that they are entitled to the natural right to support the land in Lot 9574, especially the lateral land along its north-east boundary adjoining and bOrdering PT24117, PT24118 and PT24119 but the alleged works:

(a) will result in the subsidence of the said lateral land and the loss of the natural right to support the land in Lot 9574 thereby posing a risk of building collapse and landslide at Lot 9574;

(b) are being carried out without the requisite valid and subsisting planning permission and any approval relied upon by the defendants had lapsed and has no legal force and is related to an entirely different project;

(c) are carried out, and the proposed project on the slopes are, in contravention of:

(i) the Town and Country Planning Act 1976 (Act 172) ('the TCPA 1976');

(ii) the Street, Drainage and Building Act 1974 (Act 133) ('the SDBA 1974');

(iii) the Planning Control (Development of Hill Land, High Land and Hill Side) (Pahang) Rules 2019 (Phg PU 35);

(iv) the 'Garis Panduan Perancangan Pembangunan di Kawasan Bukit dan Tanah Tinggi' ('said guidelines') approved by the National Council for Local Government; and

(v) the National Physical Plan approved by the National Physical Planning Council,

and thus, the proposed project is one that is opposed to public policy, injurious to good governance and public interest and harmful to public safety and is illegal.

[31] The plaintiffs further alleged that heavy machineries and construction vehicles were seen to have used the private road to reach to D1's lands whereas P1 and P2 did not authorise or give any license to the defendants and/or their employees, servants, agents and/or contractors to use the same. As a result, the private road is damaged and this poses a danger to visitors who use the road to reach Resorts World Genting.

[32] On 16 December 2019, P2 wrote to the Menteri Besar of Pahang to raise its concern over, and to complain about, the rapid development at Genting Highlands. Vide letter dated 27 December 2019, the office of the Menteri Besar of Pahang referred the complaint to the Chairman of the Local Government and Housing Committee of the State.

[33] P2's representatives and the consultants from Arup Jururunding Sdn Bhd ('Arup') and Mohd Asbi Associate Sdn Bhd ('Asbi') then attended a meeting with the President of MPB and her officers on 20 December 2019 to raise the issues that they have in respect of the proposed project. This was followed with a letter dated 21 January 2020 addressed to the President of MPB.

[34] P2 had also issued a notice to D1 on 21 January 2020 ('21 January 2020 notice') that, as owner of the Genting main access road, it has decided to stop D1's construction and heavy vehicles and that of D1's contractors from using the private road within 48 hours from the date of the notice. The notice further states that the works carried out on D1's lands poses a grave threat to the safety and stability of the First World Hotel on Lot 9574, the surrounding lands, roads and other properties and that the works were carried out without any approval from the authorities.

[35] D1 replied to the 21 January 2020 notice by way of a letter dated 5 February 2020 refuting the contentions made by P2.

[36] On 6 February 2020, P2's representatives met with the Housing and Local Government Committee of the State of Pahang where the grouses as to the rapid development at Genting Highlands in general, and the proposed project, in particular, were conveyed by way of a slide presentation.

[37] Vide a letter dated 17 February 2020 to D1, MPB informed that D1's application for 'Kebenaran Sementara Untuk Menggunakan Jalan Utama Genting Highlands Untuk Kerja-Kerja Cerucuk' for the proposed project was considered in the *Mesyuarat Jawatankuasa Pusat Setempat* ('OSC') *MPB Bilangan 13/2020* on 13 February 2020 and the meeting had agreed to allow slope stabilisation works to be carried out within ten days from the date of the letter. The approval was given only for 'kerja-kerja penstabilan cerun untuk cerucuk yang masih belum selesai sahaja. Kerja-kerja pembangunan lain tidak dibenarkan sehingga pelan pindaan yang diproses mendapat kelulusan daripada pihak majlis'.

[38] In view of the potential litigation arising from the alleged works, P2 had commissioned Arup and Asbi to carry out expert investigations on the stability of the slope and on the potential exposure of the buildings and properties on Lot 9574 to any potential geotechnical hazard posed by the alleged works. Arup accordingly submitted its 'Geotechnical Assessment of Slope Next to First World Hotel — Slope Stability Assessment Report' dated 21 February 2020 ('Arup's report'; exh 'IL39', encl 5) and Asbi, its 'Field Assessment On The Slopes And Reinforced Earth Walls Located At The Downhill Of First World Hotel In Genting Highlands, Pahang' dated 20 February 2020 ('Asbi's report'; exh 'IL40', encl 5).

[39] The defendants have similarly engaged their experts who have prepared the following rebuttal reports:

(a) 'Geotechnical Assessment of Slope Next to First World Hotel Rebuttal Report' dated 28 March 2020 by Ir Dr Chin Jhin Thiam of JT GeoDesign (exh 'KSK18', encl 69); and

(b) 'Independent Expert Report' dated 12 May 2020 by Ir Krishnan Raman of R&A GEOTechnics Sdn Bhd (exh 'KSK19', encl 70),

('defendants' rebuttal reports').

[40] Arup and Asbi countered the defendants' rebuttal reports with their respective rebuttal reports dated 17 July 2020, 21 July 2020 and 3 February

2021 (collectively referred to as the 'plaintiffs' rebuttal reports'; exhs 'IL(ER1)', 'IL(ER2') and 'IL(ER3)', encls 123–124 and 'IL119', encl 191).

[41] On 21 February 2020, the plaintiffs' solicitors issued letters to each of the defendants that the construction at PT24116, PT24117, PT24118 and/or PT24119 was illegal and in contravention of the said guidelines and the National Physical Plan and that it had threatened the right of support to Lot 9574. The defendants are accused of having committed nuisance and trespass as well as being negligent for carrying out the alleged works. A demand was made for the nuisance to be abated and the alleged works to cease immediately.

[42] Unsurprisingly, the plaintiffs' solicitors' letters did not have the desired result. The plaintiff's proceeded to file the SOC on 24 February 2020 (encl 2) and this was subsequently amended on 30 March 2020 (encl 54). The relief, sought together with interest and costs, are as follows:

(1) a declaration that the defendants had carried out the excavation, piling and slope-cutting works on PT24116, PT24117, PT24118 and PT24119 without the requisite planning permission/development Order or any approval under Town and Country Planning Act 1976 and the Street, Drainage and Building Act 1974

(2) a declaration that the proposed Genting Sky City project is in contravention of the Guidelines on Development Planning in Hills and Highlands (or Garis Panduan Perancangan Pembangunan di Kawasan Bukit dan Tanah Tinggi) approved by the National Council for Local Government and of the National Physical Plan approved by the National Physical Planning Council;

(3) an Order of Injunction that the defendants by itself individually or in combination among themselves and/or with its officers, employees, servants, agents and/or contractors and/or any one, or otherwise howsoever be restrained from:

(a) carrying out further excavation, piling and slope-cutting works on PT24116, PT24117, PT24118 and/or PT24119;

(b) carrying out further excavation, piling and slope-cutting works, and/or further digging out and removing earth and minerals and rock from PT24116, PT24117, PT24118 and/or PT24119 at the slopes adjacent to the private road on Lot 9574 and at the north-east boundary of Lot 9574 ('the slopes');

(c) entering by or causing heavy machineries and construction vehicles including but not limited to trucks, excavators, bulldozers and piling machines belonging to or under control of the 1st defendant and the 2nd defendant and/or their employees, servants, agents and/or contractors to enter onto the private road laid between Genting Sempah and the peak of Gunung Ulu Kali save and except to remove or

caused to be removed heavy machineries and construction vehicles from PT24116, PT24117, PT24118 and/or PT24119;

(d) repeating or continuing the nuisance of excessive noise and vibration from the works and the construction of the proposed Genting Sky City project or similar whether directly or indirectly; and

(e) carrying out any construction works on PT24116, PT24117, PT24118 and/or PT24119 for the proposed Genting Sky City project similar whether directly or indirectly.

save and except to comply with the Order in paragraph (4) below;

(4) an Order of Mandatory Injunction that the defendants individually or in combination among themselves and/or with its officers, employees, servants, agents and/or contractors and/or any one, or otherwise howsoever do forthwith restore the toe of the slopes and/or the slopes into their original topographical landscape prior to the said excavation, piling and slope-cutting works within such timeframe as may be Ordered by this Honourable Court;

(5) general damages to be assessed against the defendants;

(6) aggravated and exemplary damages to be assessed against the defendants;

...

[43] The defendants responded by filing their statement of defence and counterclaim on 17 March 2020 (encl 51) and this was also amended on 13 April 2020 (encl 59). The defendants pleaded that:

(a) D1 and/or D2 have obtained the planning permission/development Order and/or any required approval from MPB since 8 July 2015;

(b) the plaintiffs have full knowledge of the proposed project and the obtainment of the necessary approvals from the authorities. However, the plaintiffs did not, at the material time, pursue any appeal and/or judicial review application against the approval of the planning permission;

(c) D1 and/or D2 have complied with all development planning provisions pursuant to the TCPA 1976 and other relevant laws and regulations;

(d) Phase 1 of the proposed project site is the site of the 'Samaworld Theme Park' project which was discontinued around 20 years ago. When D1 acquired the property in 2012, the condition of the site was still the same except for the need for clean-up work;

(e) for purposes of Phase 1 of the proposed project, they have only dismantled the abandoned building frame left by Samaworld, created a piling platform and prepared for the preliminary test bore pile and no work for Phases 2 and 3 have started; and

(f) the slopes are in a very stable state since 1999 until today.

[44] The defendants claimed that as a result of the plaintiffs' actions, the defendants have incurred losses and they thereby counterclaimed against the plaintiffs jointly and/or severally for the following, including interest and costs (refer para 47 of the re-amended counterclaim dated 22 April 2021, encl 267):

(a) A declaration that a notice dated 21.01.2020 and/or notices applicable to withhold and/or blocking the vehicles of the defendants and/or the vehicles of the defendants' suppliers from using the access road to the Genting Sky City Project is wrongful and not enforceable;

(b) A declaration that the plaintiffs' action in withholding and/or blocking the defendants' vehicles and/or the vehicles of the defendants' suppliers from using the access road to the Genting Sky City Project is wrongful and unenforceable;

(c) A declaration that the withholding and/or blocking of the defendants' vehicles and/or the vehicles of the defendants' suppliers carrying construction materials for the Genting Sky City Project has resulted the defendants' Project unable to be carried out;

(d) A declaration that the withholding has cause foreseeable consequence to the delay in the Genting Sky City Project;

(e) A declaration that as a result from the delay of the progress in the Genting Sky City Project cause by the plaintiffs' action in wrongfully withhold and/or denying, any delay shall be borne and paid by the plaintiffs;

(f) A declaration that any losses borne by the First and/or Second defendant shall be borne and paid by the plaintiffs jointly and/or separately;

(g) An injunction against the plaintiffs on their own accord and/or through its workers and/or servants from preventing them from withhold and/or blocking the access of the defendants' vehicles and/or the vehicles of the defendants' suppliers from using the access road to the Genting Sky City Project;

(h) An injunction against the plaintiffs on their own accord and/or through its workers and/or servants from disturbing and/or interfering in the management and/or the progress of the works of the Genting Sky City Project in any way;

(i) A declaration that the plaintiffs are to bear the indemnity costs of the First and/or Second defendant for any claims faced and to be borne by the First defendant and Second defendant as a result from the plaintiffs' actions;

(j) A declaration that the plaintiffs are to bear the indemnity costs of the Third defendant, Fourth defendant, Fifth defendant and Sixth defendant for any claims against them and borne by the following defendants as a result of the plaintiffs' actions, including and notwithstanding the claims faced by and to be borne in the professional capacity as a result of the plaintiffs' actions;

(k) Cost of damages and/or losses borne by the defendants as a result from the notice and the plaintiffs' actions blocking the access road to the Genting Sky City Project;

(l) That the plaintiffs are to bear the costs, expenses, losses, legal fees, cost of solicitors-clients basis borne by the First and Second defendant;

(m) That the plaintiffs are to bear the costs, expenses, losses, legal fees, cost of solicitors-clients basis borne by the Third defendant, Fourth defendant, Fifth defendant and Sixth defendant;

(n) General damages to be assessed by the Honorable Court;

(o) Exemplary damages to be assessed by the Honorable Court;

(p) Total judgements sum deemed just by the Honorable Court;

...

[45] By way of the injunction application pursuant to O 29 of the Rules of Court 2012 ('the ROC 2012'), para 6 of the Schedule to the Courts of Judicature Act 1964 (Act 91) ('the CJA 1964') and/or Part III of the Specific Relief Act 1950 (Act 137) ('the SRA 1950'), the plaintiffs applied for, inter alia, the following Orders:

(1)(A) an order of Injunction that the defendants by itself individually or in combination among themselves and/or with its officers, employees, servants, agents and/or contractors and/or any one, or otherwise howsoever be restrained from:

(a) carrying out further excavation, piling and slope-cutting works on PT 24116, PT 24117, PT 24118 and/or PT 24119;

(b) carrying out further excavation, piling and slope-cutting works, and/or further digging out and removing earth and minerals and rock from PT 24116, PT 24117, PT 24118 and/or PT 24119 at the slopes adjacent to the private road on Lot 9574 and at the north-east boundary of Lot 9574 ('the slopes');

(c) entering by or causing heavy machineries and construction vehicles including but not limited to trucks, excavators, bulldozers and piling machines belonging to or under control of the 1st defendant and the 2nd defendant and/or their employees, servants, agents and/or contractors to enter onto the private road laid between Genting Sempah and the peak of Gunung Ulu Kali save and except to remove or caused to be removed heavy machineries and construction vehicles from PT 24116, PT 24117, PT 24118 and/or PT 24119;

(d) repeating or continuing the nuisance of excessive noise and vibration from the works and the construction of the proposed Genting Sky City project or similar project whether directly or indirectly; and

(e) carrying out any construction works on PT24116, PT24117, PT24118 and/or PT24119 for the proposed Genting Sky City project or similar project whether directly or indirectly

A Save and except to comply with the Order in (B) below, and until the determination and final disposal of the action herein;

(B) an Order of Mandatory Injunction that the defendants individually or in combination among themselves and/or with its officers, employees, servants, agents and/or contractors and/or any one, or otherwise howsoever do forthwith restore the
B toe of the slopes and/or the slopes into their original topographical landscape prior to the said excavation, piling and slope-cutting works within such timeframe as may be ordered by this Honourable Court.

...

C

[46] The plaintiffs had subsequently clarified vide their solicitor's letters to the defendants dated 26 February 2020 (exh 'IL2', encl 36) that the mandatory injunction order sought in para (B) as above quoted would be in the following terms and that additional orders in paras (C) and (D) as shown below would be required:

D

(B) the defendants individually or in combination among themselves and/or with its officers, employees, servants, agents and/or contractors and/or any one, or otherwise howsoever do forthwith, and an order of Mandatory Injunction is hereby granted compelling them to restore the toe of the slopes and/or the slopes into their original topographical landscape prior to the excavation, piling and slope-cutting
E works carried out by the defendants including but not limited to the following works:

(a) restoring the slopes to their original gradient by refilling the toe of the slopes with earth, mineral and rock;

F (b) securing, stabilising and strengthening the refilled slopes by suitable engineering measures to prevent circular slip from occurring;

(c) filling up all bored holes intended for bore piles;

(d) covering the slopes with tarpaulin sheet to mitigate the infiltration of rainfall or precipitation of water and carrying out the re-vegetation of the toe of the slopes;

G (e) putting in place slope drainage system including but not limited to cascade drain, berm drain and toe drain and ensuring all clogged drains are cleared; and

(f) setting up monitoring stations to monitor against any slope movement,

within 10 days from the service of this Order;

H (C) the Defendants do provide to this Honourable Court and the Plaintiffs:

(a) within 2 days from the service of this Order, a work schedule for the remedial and restoration works, which schedule should also set out any proposed use of the private road by the 1st defendant and the 2nd defendant to transport materials, machineries and equipment if any, solely for the remedial and restoration works as
I well as the weight and type of such materials, machineries and equipment;

(b) within 10 days from the service of this Order:

(i) a statement endorsed by a geotechnical engineer on the method(s) the 1st defendant and the 2nd defendant employed to reinstate and restore the slopes back to its original gradient as well as the toe of the slopes; and

(ii) a statement certified by the geotechnical engineer that the remedial and restoration works were duly carried out;

(D) the defendants do grant access to an independent engineering expert to be appointed by the plaintiffs to inspect the remedial and restoration works and PT24116, PT24117, PT24118 and/or PT24119 as and when deemed necessary.

[47] After having read the relevant affidavits and the plaintiffs' skeletal written submission and having heard the oral submissions by Mr Su Tiang Joo (now JC) for the plaintiffs and Dato' Jasbeer Singh for the defendants, I had, on 28 February 2020, made the following ad interim injunction order (encl 42), taking into account the terms as proposed by both learned counsels:

(1) Pursuant to Order 3 rule 5(1) of the Rules of Court 2012 that the time presecribed under Order 32 rule 3 of the Rules of Court 2012 for the hearing of this Application be abridged;

(A) the 1st and 2nd defendants by itself individually or in combination among themselves and/or with its officers, employees, servants, agents and/or contractors and/or any one, or otherwise howsoever be restrained, and an Order of Injunction is hereby granted restraining them from:

(a) carrying out excavation, piling and slope-cutting works on:

(i) HS(D) 18599, PT24116, Mukim Bentong, Daerah Bentong, Pahang;

(ii) HS(D) 18600, PT24117, Mukim Bentong, Daerah Bentong, Pahang;

(iii) HS(D) 18601, PT24118, Mukim Bentong, Daerah Bentong, Pahang; and

(iv) HS(D) 18602, PT24119, Mukim Bentong, Daerah Bentong, Pahang ('PT24116', 'PT24117', 'PT24118' and 'PT24119' respectively);

save and except to comply with the Order in paragraph (B) below, and until the determination and final disposal of the Notice of Application dated 21-1-2020;

(B) the 1st and 2nd defendants by itself individually or in combination among themselves and/or with its officers, employees, servants, agents and/or contractors and/or any one, or otherwise howsoever do forthwith, and an Order is hereby made requiring the 1st and 2nd defendants to:

(a) stabilise the toe of the slope in PT 24116, PT 24117, PT 24118 and PT 24119;

(b) fill up two (2) bore holes intended for bore piles;

(c) cover the toe of the slopes with plastic sheet to mitigate the infiltration of rainfall or precipitation of water on the toe of the slope;

(d) ensure all clogged drains are cleared; and

(e) set up monitoring stations as recommended by GT Geodesign in the letter dated 28-2-2020 to the 1st defendant under Reference No. GMAS/Lot11203(Phase-1)/2020/Gen/c1 to monitor against any slope movement,

to be commenced immediately starting from 2-3-2020 and to be completed on or before 1-4-2020;

(C) the 1st and 2nd defendants do provide to this Honourable Court and the plaintiffs:

(a) by 3-3-2020, a work schedule for the works in paragraph (B) above;

(b) within 14 days of the completion of the works in paragraph (B) above:

(i) a statement endorsed by a geotechnical engineer on the method(s) the 1st defendant and the 2nd defendant employed to carry out the works in paragraph (B) above; and

(ii) a statement certified by the geotechnical engineer that the works in paragraph (B) were carried out;

(D) the Notice of Application dated 21-2-2020 be fixed for hearing on 29-4-2020;

(E) the costs of this ad interim injunction together with all incidental costs be reserved to the hearing of Notice of Application dated 21-2-2020; and

(F) liberty to apply is given to all parties.

[48] During the discussion on the terms of the ad interim injunction order, I had opined that, considering the diametrically opposed views by the parties' experts on, among others, the stability of the slopes and the potential exposure of the buildings and properties on Lot 9574 to any potential geotechnical hazard posed by the excavation, piling and slope-cutting works carried out by the defendants as evident in their reports, an expert appointed by the court pursuant to O 40 of the ROC 2012 would materially assist the court in determining the issues that arise from the pleadings, especially on technical matters.

[49] The learned counsels agreed that the appointment of an independent expert to inquire and report upon a specific scope of tasks is apt in the circumstances of this case. Hence, among the directions of the court on the night of 28 February 2020 was for the parties to nominate the names to be considered as the court expert and these are to be conveyed to the court at the case management ('CM') on 6 March 2020.

[50] The common candidate nominated by the parties as the court expert was Dr Ooi, a registered accredited checker in geotechnical. Dr Ooi was accordingly appointed as the court expert on 17 July 2020 pursuant to O 32 r 12 and/or O 40 of the ROC 2012 with the consensus of the parties (encl 129).

[51] However, earlier during the CM on 20 May 2020, the learned counsels had informed the court that the plaintiffs and the defendants were unable to reach an agreement on the scope of task of the court expert for the geotechnical works to be carried out on D1's lands. This led to the plaintiffs' application

dated 10 June 2020 (encl 98) and ultimately the order below dated 18 January 2021 (encl 187) wherein the scope of tasks for the court expert are as per Appendix A to the order:

(1) The court expert, Ir Dr Ooi Teik Aun, shall undertake the tasks as set out in Appendix A hereto and upon the court expert giving a 2-day's notice to Messrs. Jasbeer, Nur & Lee, the solicitors for the defendants, the defendants shall allow the court expert and such other persons assisting the court expert access to:

(i) HS(D) 18599, PT24116, Mukim Bentong, Daerah Bentong, Pahang;

(ii) HS(D) 18600, PT24117, Mukim Bentong, Daerah Bentong, Pahang;

(iii) HS(D) 18601, PT24118, Mukim Bentong, Daerah Bentong, Pahang; and

(iv) HS(D) 18602, PT24119, Mukim Bentong, Daerah Bentong, Pahang

for such period as may be required by the court expert to undertake and complete the tasks as set out in Appendix A hereto;

(2) The abovenamed court expert shall prepare and submit to this Honourable Court and the parties a Report within 30 days of completion of the tasks as set out in the Appendix A hereto;

(3) The abovenamed court expert shall submit the sum of his remuneration to this Honourable Court, the solicitors for the plaintiffs and the solicitors for the defendants within 7 working days of the Order herein and the abovenamed court expert shall be paid jointly and severally by the plaintiffs and the defendants the said remuneration by the following instalments:

(i) a sum equivalent to 20% of the remuneration payable and any service tax chargeable thereon within 10 working days from the date of submission of the remuneration sum by the court expert;

(ii) a sum equivalent to 60% of the remuneration payable and any service tax chargeable thereon within 10 working days of the submission of the Report stipulated in paragraph (3) above; and

(iii) a sum equivalent to 20% of the remuneration payable and any service tax chargeable thereon within 10 working days of the discharge of the court expert after his evidence has been taken in court or the disposal of this action, whichever earlier;

(4) The abovenamed court expert shall be reimbursed for all expenses incurred in undertaking the tasks set out in the Appendix A, preparing the Report stipulated in paragraph (3) above and attending court to give evidence in this action, which expenses shall be submitted by the court expert to this Honourable Court, the solicitors for the plaintiffs and the solicitors for the defendants at monthly intervals and shall be jointly and several payable by the plaintiffs and the defendants within 10 days of the said submission;

(5) Subject to any further Order providing for payment of the aforesaid remuneration and expenses incurred as part of the costs of the cause and/or as costs to follow the event under Order 59 rule 3(2) of the Rules of Court 2012, the

aforesaid remuneration and expenses incurred shall be jointly and severally paid by the plaintiffs and the defendants in accordance with Order 40 rule 5 of the Rules of Court 2012;

(6) Liberty to apply is given to the abovenamed court expert and the parties; and

(7) The costs of the application in Enclosure 98 together with all incidental costs be costs in the cause of the action herein.

Appendix A

SCOPE OF TASKS OF THE COURT EXPERT FOR GEOTECHNICAL WORKS THE ASSESSMENT OF STABILITY OF EXISTING SLOPE NEXT TO THE FIRST WORLD HOTEL DUE TO OVERALL GENTING SKY CITY DEVELOPMENT

The court expert shall check the suitability and adequacy of the design on all geotechnical engineering works with particular reference to technical adequacy, constructability, long term safety and serviceability and in compliance with the relevant legislation, codes of practice, standards and guidelines. It should also include independent interpretations and calculations for critical elements such as drainage system, slope stability, foundation system of Phase 1, Phase 2 and Phase 3 of the Genting Sky City Development.

The Tasks for the court expert shall include the following:

(1) Collect on-site information and produce 3-D terrain model based on topographical survey of the site.

(2) Highlight geological implication on the design.

(3) Check and comment on the adequacy of the subsurface investigation (S.I.) and laboratory tests carried out for the proposed development.

(4) Carry out independent interpretation of subsurface investigation (S.I.) and subsoil profiles.

(5) Check all the assumptions, interpreted and selected design soil/rock parameters and groundwater conditions.

(6) Check the geotechnical analyses and designs of slopes:

(a) Slope terrain classification — Zoning of slopes at the site into different classes in accordance to authorities' requirements.

(b) Slope stability analyses of existing, natural and engineered cut and fill slopes. Various failure modes shall be checked including relevant surcharge loads etc.

(c) Strengthening works for soil and rock slopes (e.g. soil nails, rock bolts, dowels, etc.) with comments for regular monitoring and maintenance.

(d) Effects on surface and ground water and the provision of adequate drainage measures.

(7) Check the geotechnical analyses and designs of foundations:

(a) Suitability of the types of foundation systems proposed.

(b) Detailed analyses and designs of the foundations including bearing capacity.

(c) Proposed testing programme.

(8) Check the geotechnical analyses and designs of existing RE Walls:

(a) External stability of the existing RE wall.

(9) Check the long-term maintenance programme of the slopes and retaining walls (such as the maintenance of slopes, permanent ground anchors, drainage and weepholes).

(10) Perform independent calculations with the view to determine the adequacy of the key elements of the project including slopes, retaining walls and foundations. If calculations on analysis and elemental design are done with the aid of engineering software, the design assumptions, and limitations of such software should be ascertained and stated. The design parameters, which are the computer inputs should be mentioned.

(11) The court expert shall review and check all relevant information, data reports, etc as regards to the stability of the existing slope next to First World Hotel and extending to the present Lot 11203 Phase-1 project site and the proposed Phase 2 and Phase 3 of the Genting SkyCity Development. The stability of the slope shall be assessed with respect to its long term stability as appropriate.

(12) The following information shall be made available to the court expert:

(a) Ground survey information of the existing slope next to First World Hotel.

(b) The existing site ground platform conditions at the Phase-1 project site.

(c) The available soil investigation data for the existing slope next to First World Hotel conducted previously as tabulated below:

(i) Soil Investigation (Year 1999) => 5 nos. boreholes (BH-I1 to BH-I5) [refer report by ARUP (2020)]

(ii) (ii) Soil Investigation (Year 2015) => 23 nos. boreholes (BH-1 to BH-23) [SI conducted by M/s Bumimetro Engineering Sdn. Bhd.]

(iii) (iii) Soil Investigation (Year 2018) => 6 nos. boreholes (ABH-1 to ABH-6) [for Phase-1 project site; by M/s Bumimetro Engineering Sdn. Bhd.]

(d) The relevant plaintiffs' reports as tabulated below:

(i) Field Assessment on the Slopes and Reinforced Earth Walls Located at the Downhill of First World Hotel in Genting Highlands, Pahang. [report ref: MAA/19.77/19/G/AR/47 dated 20th February 2020 by M/s Mohd Asbi Associates Sdn. Bhd.]

(ii) Geotechnical Assessment of Slope next to First World Hotel — Slope Stability Assessment Report.
[report ref: 0003 RepTJH Slope Assessment Report dated 21st February 2020 by M/s Arup Jururunding Sdn. Bhd.]

(e) The relevant engineering rebuttal reports by defendants as stated below:

(i) Geotechnical Assessment of Slope next to First World Hotel Rebuttal Report dated 28.03.2020 by Ir Dr Chin Jhin Thiam.

(ii) Independent Expert Report dated 12.05.2020 by Ir Krishnan Raman.

(f) The relevant engineering rebuttal reports by the plaintiffs to the reports in paragraph (e) that may be presented by the plaintiffs.

(g) Building plans, earthworks plans and such other plans as may be required by the court expert including those pertaining to the proposed Phase 2 and Phase 3 of the Genting Sky City Development'.

[52] A final material background fact pertains to P1's appeal to the Appeal Board of Negeri Pahang vide a notice of appeal dated 15 April 2020 under sub-s 23(1) of the TCPA 1976 against the decisions of MPB on 24 October 2019, 11 December 2019 and 13 February 2020. The parties in dispute in that appeal are D1 and D5's firm. On 7 April 2021, the appeal board allowed the preliminary objection raised by MPB as the respondent and struck out the appeal on the ground that the approvals which were given at the meetings held on 24 October 2019, 11 December 2019 and 13 February 2020 '... bukanlah kelulusan pemberian KM di bawah s 22(3) Akta 172' and are therefore not appealable.

THE EOT APPLICATION (ENCL 65)

[53] The EOT application was first heard using remote communication technology ie Skype video conferencing on 25 June 2020. Even though the plaintiffs' counsel had earlier proposed that the EOT application be heard together with the injunction application, at that time the court took the view that the former needs to be considered first because the ad interim injunction order was for the works to commence on 2 March 2020 and to be completed on or before 1 April 2020. Being fully aware that the Government of Malaysia ('Government') had implemented the Movement Control Order ('MCO') as a *cordon sanitaire* to contain the Covid-19 pandemic with lockdown and restrictions being imposed on the whole country from 18 March 2020, the court was naturally anxious to know the status of the works in view of the end date for completion is 1 April 2020 and that, understandably this may, to some extent, be affected by the MCO. Safety consideration is paramount, and the court wanted to be quickly apprised of the situation.

[54] However, after hearing the oral submissions by the learned counsels, it was apparent that the averments and exhibits which may be relevant to the determination of the EOT application are in the affidavits filed for the injunction application. The parties' case in respect of any application before the

court should not be jeopardised in any way and hence, it was decided that the EOT application should be heard together with the injunction application.

[55] The hearing eventually took place in open court on 19 March 2021 and thereafter, a clarification session was held via *Zoom* video conferencing on 28 May 2021 before the decision was pronounced, again by *Zoom* video conferencing, on 31 May 2021.

[56] As adverted to earlier, the works as stated in para (B) of the ad interim injunction order was to commence immediately from 2 March 2020 and to be completed on or before 1 April 2020. Given that para (F) of the ad interim injunction order allows for liberty to the parties to apply, D1 and D2 filed the EOT application on 8 May 2020 pursuant to O 29 r 7 and O 92 r 4 of the ROC 2012 and/or the inherent jurisdiction of the court seeking an EOT until 19 May 2020 to continue and complete the works as stipulated in the ad interim injunction order. D1 and D2 also prayed that they be given liberty to make any further application in respect of the timeline for the completion of works as described in the ad interim injunction order.

[57] The relevant cause papers for the EOT application, apart from the ad interim injunction order and the notice of application itself, are as listed below:

(a) the defendants' AIS affirmed by D1's Director, Khoh Siew Kim on 8 May 2020 (encl 66);

(b) the plaintiffs' affidavit in reply ('AIR') affirmed by Izwan bin Abdullah on 19 May 2020 (encls 74–79);

(c) the defendants' AIR affirmed by the same deponent on 4 June 2020 (encl 96);

(d) the plaintiffs' AIR also affirmed by the same deponent on 10 June 2020 (encl 97); and

(e) the defendants' AIR (No 2) affirmed on 12 June 2020 (encl 104).

The defendants' submissions

[58] The defendant submitted that there are cogent reasons to support the application for EOT to complete the works, namely that:

(a) D1 and D2 had complied with the ad interim order until 17 March 2020 by providing a work schedule on 3 March 2020 to the plaintiffs' solicitors on 3 March 2020 and by carrying out the works, ie filling concrete into the two bore holes, installing the inclinometers at the site of the project, covering the toe of the slopes with plastic sheets and

holding it with rock fill, and cleaning the clogged drains. The statements dated 1 June 2020 in respect of the works carried out and the methods for the same were also provided;

(b) the works were about 67% completed and ahead of the time prescribed in the work schedule when the Government implemented the MCO whereby a lockdown and restrictions were imposed on the whole country from 18 March 2020. This unprecedented situation since the 1918 Spanish Flu warrants a favorable exercise of the discretion of the court to allow the EOT application;

(c) pursuant to the Prevention and Control of Infectious Diseases Act 1988 (Act 342) and the regulations imposed by the Government, the construction industry was not allowed to operate during the MCO unless the works fall under the category of critical works, wherein permission must be obtained from the relevant authorities. The defendants sought permission from the relevant authorities to restart work at the material time. Upon obtaining permission via letter dated 29 April 2020 from the Ministry of International Trade and Industry ('MITI'), D1 and D2 have continued to carry out the works and these were completed on 18 May 2020. Hence, the EOT application should be granted to regularise the issue of time; and

(d) the EOT sought is fair and reasonable as it is due to a global pandemic being extenuating circumstances outside the control of the parties and there was no intention to ignore or flout the ad interim injunction order. The primary issue of concern is public safety in Genting Highlands and all parties will benefit from the works completed by the defendants.

The plaintiffs' submissions

[59] The plaintiffs asserted that the EOT application should be dismissed on the following grounds:

(a) there is a total want of full and frank disclosure of all material facts by D1 and D2 in seeking the indulgence of the court for an EOT until 19 May 2020 to carry on and complete the works as stipulated in para (B) of the ad interim injunction order;

(b) D1 and D2 had omitted the stabilisation works to the toe of the slope as ordered under para (B)(a) of the ad interim injunction order and had intentionally refused to commence and carry out any slope stabilisation works. These works were not included in the work schedule and revised works schedule submitted by D1 and D2;

(c) even if any slope stabilisation work had been carried out, D1 and D2 did not commence such works immediately from 2 March 2020, as required under para (B) of the ad interim injunction order. The coming into force

of the MCO on 18 March 2020 is not a good excuse as the immediate-start date of 2 March 2020 was more than two weeks before the MCO. D1 and D2 had admitted its blatant disregard of the immediate start date of 2 March 2020 by claiming that stabilisation works were purportedly carried out on 5 May 2020 and 7 May 2020. No explanation was provided as to the inaction in commencing and carrying out slope stabilisation works during the period from 2 March 2020 to 17 March 2020;

(d) D1 and D2 have attempted to misleadingly equate the purported installation of inclinometers with slope stabilisation works;

(e) the EOT application is unnecessary as D1 and D2 claimed that the works have been completed on 18 May 2020. The EOT application was filed to divert attention from the fact that slope stabilisation works were not carried out at all or immediately starting from 2 March 2020; and

(f) the prayers in encl 65 are wide and contradictory. In prayer (c), D1 and D2 applied for an EOT until 19 May 2020 but in prayers (b) and (d), they sought an extension for an unknown period even though D1 and D2 claimed that the works have been completed on 18 May 2020. As such, prayers (b) and (d) are designed to circumvent the ad interim injunction order, particularly the restraining injunction in para (A) and the stipulation in para (B) that the works are 'to be commenced immediately starting from 2 March 2020 and to be completed on or before 1 May 2020'.

Analysis and findings of the court

[60] The EOT application is made pursuant to O 29 r 7 of the ROC 2012 which provides that 'Where an application is made under any of the provisions of this order, the court may give directions as to the further proceedings in the cause or matter' and O 92 r 4 of the ROC 2012 on the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

[61] In exercise of the power under sub-s 11(2) of the Act 342, the Minister had made and promulgated the Prevention and Control of Infectious Diseases (Measures Within Infected Local Areas) Regulations 2020 (PU(A) 91/2020) ('2020 Regulations') on 18 March 2020 and having effect for the period from 18 March 2020 to 31 March 2020. This was followed by the Prevention and Control of Infectious Diseases (Measures Within Infected Local Areas) Regulations (No 2) 2020 (PU(A) 109/2020) ('2020 Regulations (No 2)') made on 31 March 2020 and having effect for the period from 1 April 2020 to 14 April 2020 (see too, the amendment in PU(A) 112/2020 and PU(A) 117/2020, PU(A) 133/2020, PU(A) 136/2020 and PU(A) 147/2020 which

were in force for the period from 15 April 2020 to 9 June 2020).

[62] Further, after having been satisfied that all States and Federal Territories in Malaysia are threatened with an epidemic of a life-threatening microbial infection as specified in Part I of the First Schedule to the Act 342, namely Covid-19, the Minister of Health had declared the State of Pahang to be an infected area effective from 18 March 2020 to 31 March 2020 vide the Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) Order 2020 (PU(A) 87/2020). This order was subsequently extended from 1 April 2020 to 14 April 2020 vide the Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) (Extension of Operation) Order 2020 (PU(A) 98/2020) (see too, the Corrigendum in PU(A) 102/2020 and PU(A) 116/2020, PU(A) 132/2020 and PU(A) 146/2020 which further extended the operation of the order for the period from 15 April 2020 to 9 June 2020).

[63] The court has perused the cause papers and the documentary evidence and considered the same together with the written and oral submissions for the parties and finds that:

(a) para (B)(a) of the ad interim injunction order clearly states that among the works which D1 and D2 have to carry out is to stabilise the toe of the slope in PT 24116, PT 24117, PT 24118 and PT 24119. However, a scrutiny of the work schedule in exh 'IL(EOT2)4', encl 74 and the revised work schedule in exh 'KSK2', encl 66 as submitted by D1 and D2 did not include any task relating to the stabilisation of the toe of the slopes. The same applies for the completed work schedule as of 18 May 2020 (see exh 'KSK9', encl 96);

(b) the plaintiffs' solicitors had, vide letters dated 2 March 2020 and 5 March 2020 and an email dated 30 March 2020 to the defendants' solicitors, placed on record that no slope stabilisation works were carried out from 2 March 2020 (see exhs 'IL(EOT2)6' and 'IL(EOT2)9', encl 74). The defendants' solicitors did not respond to these correspondences;

(c) the defendants made no averments as to the steps taken to commence and carry out the slope stabilisation works between the period 1 March 2020 and 17 March 2020 (ie before the MCO which came into effect on 18 March 2020) in the affidavits affirmed before the hearing date on 25 June 2020.;

(d) item 22 in the Schedule to the 2020 Regulations provides that 'Any services or works determined by the Minister as essential or critical to public health or safety' comes within the definition of 'essential services' in reg 2.

Regulation 5 and sub-reg 7(2) of the 2020 Regulations (No 2) provide for movement due to special and particular reason with written permission of the police and for movement to carry out works on infrastructure in these words:

> 5. Where, due to a special and particular reason, a person needs to move from one place to another place within any infected local area or from one infected local area to another infected local area, that person shall obtain prior written permission of the police officer in charge of the police station nearest to the residence of such person.
>
> ...
>
> 7. ...
>
> ...
>
> (2) Any movement from one place to another place within any infected local area or from one infected local area to another infected local area may be made by any person to carry out any works on any infrastructure which if not carried out would affect the safety and the stability of the infrastructure.

(e) based on paras 1–4 in 'Soalan Lazim (FAQ's) Berkaitan Perintah Kawalan Pergerakan, Kementerian Kerja Raya Malaysia (KKR)' dated 18 March 2020 and updated on 24 March 2020 by KKR and 'Soalan Lazim Bil 2 Berkaitan Perintah Kawalan Pergerakan, Kementerian Sumber Manusia' dated 23 March 2020 in exh 'KSK4', encl 66, all construction and maintenance works have to cease with exception being given only for critical works which are 'kerja-kerja yang mana jika sekiranya tidak diteruskan boleh mendatangkan mara bahaya atau kemudaratan kepada pekerja, orang awam atau persekitaran'. The examples given of critical works include: 'a) Pembaikan Cerun'; and 'm) Kerja-kerja lain yang jika tidak disempurnakan boleh mendatangkan bahaya'. The procedure by which an application for exemption can be made is explained in para 5 of the FAQ's.

In paras 13–18 of the AIS (see too, exhs 'KSK5', 'KSK6' and 'KSK8', encl 66 and exh 'KSK11', encl 96), the defendants explained that:

(i) on 2 April 2020, D2 had referred to the police to be allowed to travel so as to carry out the works but it was informed that since the works are pursuant to an order of the court, permission has to be obtained from Jabatan Keselamatan dan Kesihatan Perkerjaan ('JKKP');

(ii) D2 had applied to the Director of JKKP, Kuantan, Pahang on 2 April 2020 to be allowed to carry out the works as per the ad interim injunction order and was informed via email dated 6 April 2020 that '... permohonan untuk meneruskan aktiviti-aktiviti bagi

perkhidmatan (pembinaan dan pengubahsuaian) telah pun DITUTUP';

(iii) D1 and D2 then attempted to apply to MITI but they were unable to upload the application in MITI's website until 15 April 2020. On 22 April 2020, MITI rejected the application and D1 and D2 had made an appeal on the same date; and

(iv) MITI had, on 29 April 2020, given the 'kebenaran beroperasi' and permission for D2's workers to travel from their dwelling to the site of the proposed project.

The evidence shows that D1 and D2 made no effort during the period from 18 March 2020 to 1 April 2020 to apply for permission to carry out the slope stabilisation works. The first effort started only on 2 April 2020 although D1 and D2 could have written to the Minister to apply for a determination that the works as stipulated in the ad interim injunction order are essential to public safety;

(f) slope stabilisation works under para (B)(a) of the ad interim injunction order and installation of inclinometers under para (B)(e) are clearly different works. Other than being separately provided in the order, the fact is that inclinometers, if installed properly and at the correct locations, only function to monitor the movement of the slopes and do not by themselves stabilise the slopes;

(g) in para 6 of the defendants' AIR (No 6) affirmed by the same deponent, Khoh Siew Kim, for the injunction application (encl 134), the defendants referred to their solicitors' letter to the plaintiffs' solicitor dated 14 July 2020 in exh 'KSK26' to support the contention, inter alia, that stabilisation works for the toe of the slopes had been carried out on 3 March 2020, 9 March 2020, 14 March 2020, 16 March 2020, 17 March 2020, 5 May 2020, 6 May 2020, 7 May 2020, 15 May 2020, 16 May 2020 and 18 May 2020 as evidenced by the photographs which were purportedly taken on those dates. However, there are no dates on the photographs allegedly taken before 18 March 2020 for the 'Stabilization Works For Toe of Slope';

In my opinion, the averments and the photographs seemingly for the 'Stabilization Works For Toe of Slope' in exh 'KSK26' are questionable as these were not in the defendants' affidavits which were filed before 25 June 2020. If the averments are true, the photographs could have easily been included in the defendants' affidavits for the EOT application. In addition, the defendants' solicitors could have easily replied to the correspondence by the plaintiffs' solicitors in March 2020 as mentioned in subpara (b) above to refute the plaintiffs' allegations. When the court inquired at the hearing as to why the defendants' solicitors did not do so, Dato' Jasbeer replied that it is because the plaintiffs' and/or their solicitors were nit-picking and there is no need for

him to respond to such petty matters.

In these circumstances, the court accepts the plaintiffs' submission that the averments and exh 'KSK26' in respect of the stabilisation works for the toe of the slopes are an afterthought;

(h) based on the notes of proceedings on 27 February 2020 (CM — encl 4) and 25 June 2020 (hearing of encl 65 and CM for encls 1, 4, 58, 62 and 63), the defendants' counsel informed the court that there are two bore holes. More precisely, on 27 February 2020, Dato' Jasbeer Singh said, among others, that:

> Since 19 January 2020, the 1st defendant's lorries cannot enter, the road is a private road and no consent was given to use it. *There are 2 bore holes that need to be covered quickly*. Majlis Daerah Bentong gave a letter but that's for the slope, we're waiting for another letter regarding the holes. There should not be an injunction. We have asked for permission to use the road but it was not granted. (Emphasis added.)

Apart from the above oral statement, Mr Teh Eng Lay had highlighted the following written representations by the defendants that there are only two bore holes:

(i) the defendants' letter dated 26 February 2020;

(ii) MPB's letter dated 5 March 2020 in reply to D1's letter dated 26 February 2020 informing that '... permohonan tuan telah diangkat untuk pertimbangan Mesyuarat Jawatankuasa Pusat Setempat (OSC), Majlis Perbandaran Bentong Bilangan 04/2020 yang telah bersidang pada 27hb Februari 2020. Mesyuarat telah membincangkan semula perkara ini dan bersetuju membenarkan baki kerja-kerja cerucuk berjumlah dua (2) lubang yang masih belum selesai dijalankan. Kerja-kerja pembangunan lain tidak dibenarkan sehingga pelan yang diproses mendapat kelulusan penuh daripada pihak Majlis Pebandaran Bentong.' (see exh 'KSK14' in the defendants' AIR (No 3) affirmed on 16 March 2020, encl 49 in respect of the injunction application);

(iii) the revised work schedule titled 'GENTING HIGHLAND — PHASE 1 — PROGRAMME FOR NEXT 1 MONTH (WITH OPTION OF ADDITIONAL ONE MONTH)' in exh 'KSK2', encl 66 where the defendants claimed that they had scheduled the commencement of works on 'Bored Pile E/7' on 3 March 2020 taking six days with completion on 8 March 2020 and 'Bored Pile I/2/1' on 9 March 2020 taking six days with completion on 15 March 2020;

(iv) the report on the 'Progress for Work for One Month Programme' in exh 'KSK3', encl 66 where the defendants stated that 'Cleaning of

the 2 bored holes started on 3/3/20 and concrete materials were delivered to site on 4/3/20. The two nos of bored holes were backfilled with concrete on 5/3/20 and 8/3/20 (Refer Picture 1, 2)';

(v) the statement of methods employed for the works and statement of certification of works done both dated 1 June 2020 by JT GeoDesign, acting for the defendants, which were sent to the court vide the defendants' solicitors' letter dated 2 June 2020 (see exh 'KSK10', encl 96) in accordance with para (C)(b)(i) and (ii) of the ad interim injunction order where the defendants confirmed the methods for 'Backfiling of 2 Nos of Bored Holes (Item B (b) of the court order)' and that the '... The 2 nos of bored holes were backfilled with concrete on 5/3/20 and 8/3/20 ...';

(vi) the document titled 'GENTING HIGHLAND — PHASE 1 — COURT ORDERED WORKS — PROGRESS AS AT 18/05/2020' in exh 'KSK9', encl 96 stating that works on 'Bored Pile E/7' had commenced on 6 March 2020 and were completed on 11 March 2020 and works on 'Bored Pile I/2/1' commenced on 13 March 2020 and were completed on 18 March 2020; and

(vii) the table of works completed from 3 March 2020 onwards with reference to the works as listed in the revised work schedule and terms of the ad interim injunction order which have been complied with in Annexure A to the defendants' solicitors' letter dated 14 July 2020 in exh 'IL66' of the plaintiffs' AIR No 2 affirmed on 22 July 2020 for the injunction application (encl 125). The 'Installation of Rebar & backfilling of First Bored Hole with concrete' and 'Installation of Rebar & Backfilling of Second Bored Hole with concrete' is said to have been completed on 5 March 2020 and 9 March 2020, respectively.

Paragraph (B)(b) in the ad interim injunction order was made premised on the fact there are two bore holes. However, there has since been evidence of the existence of a third bore hole (see paras 12–15 of the plaintiffs' AIR No 5 affirmed on 9 February 2021 for the injunction application (encl 191) regarding the 'Unfilled Bore Hole' and paras 14–16 of the defendants' AIR No 7 affirmed on 26 February 2021 (encl 216)).

Specifically, in para 16 of encl 216, the defendants averred that:

> 16. Saya sesungguhnya mengatakan bahawa dua (2) lubang cerucuk tersebut iaitu pada E/7 dan 1/2/1 telah pun siap diisi dengan konkrit. Namun, dakwaan Plaintif-Plaintif yang membangkitkan kononnya lubang cerucuk masih tidak diisikan sepertimana dalam fotografi di Eksibit IL-79 tersebut adalah tidak benar. *Saya menjawab dan mengatakan bahawa lubang cerucuk dalam fotograpi di Eksibit IL-79 tersebut adalah lubang cerucuk yang lain di mana Defendan-Defendan telah menebuk ('boring')* namun tidak mencapai

kedalaman yang diperlukan disebabkan terpaksa dihentikan akibat dari Perintah Ad Interim tersebut. (Emphasis added.)

The documents as listed above speak for themselves. The defendants had, prior to encl 216, always maintained that there were only two bore holes. It was only when the plaintiffs produced the latest photographic evidence and raised the same that the defendants averred that the unfilled bore hole is actually a third bore hole. No disclosure was made about the existence of a third bore hole prior to that. Therefore, the irresistable conclusion is that there is deliberate non-disclosure and suppression of evidence regarding the third bore hole by the defendants.

[64] It is trite law that the burden is on the applicant who seeks an EOT to make available sufficient material upon which the court may exercise its discretion in his favour. Any person seeking the indulgence of the court under any rule or circumstance should make full, frank, candid and honest disclosures of all the relevant facts. Failure to do so could result in the court refusing to exercise its discretion in favour of the applicant (see the Court of Appeal decision in *Tan Siew Peng v OCBC Bank (M) Bhd* [1998] 2 MLJ 420; [1998] 2 CLJ 684 and the High Court in *Hong Leong Equipment Sdn Bhd v Manfo Development Sdn Bhd* [1986] 1 CLJ 417, *Kejuruteraan Taipan (M) Sdn Bhd v Loh & Loh Constuction Sdn Bhd* [2010] MLJU 1987; [2012] 1 CLJ 130 and *Bukit Lenang Development Sdn Bhd v Telekom Malaysia Berhad & Ors (No 2)* [2014] 6 CLJ 713).

[65] It must be impressed that the regulations made under Act 342 and the FAQs issued pursuant to the MCO do not, in any way, supersede or suspend the ad interim injunction order. Whilst the court acknowledges that the Covid-19 pandemic and the MCO posed some challenges to the defendants in carrying out and completing the works as stipulated in the ad interim injunction order, nonetheless the order must continue to be respected and in coming to this court as they are allowed to do under para (F) of the order, the defendants have to make full and frank disclosure of the actions which they have taken during the periods between 2 March 2020 and 17 March 2020, 18 March 2020 and 1 April 2020, and 2 April 2020 and 3 May 2020, in particular with respect to the slope stabilisation works which were purportedly carried out only on 5 May 2020 and 7 May 2020.

[66] It is my considered view that the defendants have not been entirely candid in the averments in support of the EOT application and offered no explanation for their failure and omission or delay in carrying out the works to stabilise the toe of the slopes and with regards to the presence of the third bore hole.

Conclusion

[67] In summary, D1 and D2 have not presented a satisfactory case to merit favorable consideration of the application for leave and EOT to be granted to stabilise the toe of the slopes as per para (B)(a) in the ad interim injunction order. The EOT application was thus dismissed with costs of RM10,000 as counter proposed by Dato' Jasbeer Singh to the astronomical sum of RM50,000 as suggested by Mr Teh Eng Lay.

THE INJUNCTION APPLICATION (ENCL 4)

[68] By way of the injunction application, the plaintiffs applied for a prohibitory injunction and a mandatory injunction. The jurisdiction of the court to grant an injunction is, as rightly cited by the plaintiffs in encl 4, provided in para 6 of the Schedule to the CJA 1964 and Part III of the SRA 1950 on 'Preventive Relief'.

[69] The provisions in Part III of the SRA 1950 which are relevant for present purposes are as follows:

> 50 Preventive relief is granted at the discretion of the court by injunction, temporary or perpetual.
>
> 51 Temporary and perpetual injunctions
>
> (1) Temporary injunctions are such as are to continue until a specified time, or until the further order of the court. They may be granted at any period of a suit, and are regulated by the law relating to civil procedure.
>
> ...
>
> 53 Mandatory injunctions
>
> When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

[70] The cause papers for the injunction application are as follows:

(a) the plaintiffs' AIS in the English language affirmed by Izwan bin Abdullah on 24 February 2020 (encl 5);

(b) the plaintiffs' further affidavit No 1 affirmed by the same deponent on 25 February 2020 (encl 28);

(c) the defendants' AIR No 1 affirmed by Khoh Siew Kim on 28 February 2020 (encl 35);

(d) the plaintiffs' Further Affidavit (No 2) affirmed on 28 February 2020 (encl 36);

(e) the defendants' AIR (No 2) affirmed by the same deponent on 28 February 2020 (encl 38);

(f) the plaintiffs' AIS in the national language affirmed on 9 March 2020 (encl 43);

(g) the defendants' AIR (No 3) affirmed on 16 March 2020 (encl 49);

(h) the defendants' further affidavit affirmed on 19 May 2020 (encl 69);

(i) the plaintiffs' AIR affirmed on 19 May 2020 (encl 80);

(j) the defendants' AIR (No 5) affirmed on 22 June 2020 (encl 114);

(k) the expert's affidavit affirmed by Mohd Asbi bin Othman on 22 July 2020 (encl 119);

(l) the plaintiffs' AIR affirmed on 22 July 2020 (encls 123–124);

(m) the plaintiffs' AIR (No 2) affirmed on 22 July 2020 (encl 125);

(n) the plaintiffs' AIR (No 3) affirmed on 5 August 2020 (encls 132–133);

(o) the defendants' AIR (No 6) affirmed on 26 August 2020 (encl 134);

(p) the plaintiffs' AIR (No 4) affirmed on 27 August 2020 (encls 136–137);

(q) the plaintiffs' AIR (No 3) affirmed on 15 September 2020 (encls 141–142);

(r) the plaintiffs' AIR (No 5) affirmed on 9 February 2021 (encls 191–207);

(s) the defendants' AIR (No 7) affirmed on 26 February 2021 (encl 216);

(t) the plaintiffs' AIR (No 4) affirmed on 5 March 2021 (encl 217); and

(u) the plaintiffs' AIR (No 6) affirmed on 8 April 2021 (encl 257).

[71] Both learned counsels for the plaintiffs and the defendants had cited the same long-standing case authorities on the guiding principles when considering an application for an interim injunction, namely, the decision of the House of Lords in *American Cyanamid Co Appellants v Ethicon Ltd* [1975] 1 All ER 504 and the Court of Appeal in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 (the defendants additionally referred to the High Court case of *Sarkawi bin Sadijo (T/A Jojo's Musical and Promotion House) v BMG Music (M) Sdn Bhd & Ors* [1996] 4 MLJ 515).

[72] Essentially, the test to be satisfied by the plaintiffs is as follows:

(a) whether the totality of facts of the case disclose a bona fide serious issue to be tried;

(b) whether damages would serve as an adequate remedy if the plaintiffs succeeds at the trial of the action;

(c) the balance of convenience in granting the injunction sought; and

(d) whether there are any 'special factors'

(see *Law and Practice of Injunctions in Malaysia*, General Editor Robert Lazar and a team of contributors, Sweet & Maxwell, 2020 at pp 8–9).

First issue: are there bona fide serious issues to be tried?

[73] The phrase 'bona fide serious issues to be tried' basically means that there must be a bona fide serious issue to be tried in respect of the plaintiffs' cause of action, based on the totality of the facts presented before this court. The court has to examine the pleadings whilst bearing in mind that these, and the evidence to support the facts as pleaded, are not complete as yet. The court must be satisfied that there is a prima facie valid cause of action and that the plaintiffs' claim is not frivolous or vexatious. The court must not make any determination on the merits of the claim or the defence and nor with a view of resolving the conflicts of evidence as borne out in the affidavits filed in support of the injunction application. Complex issues of law are also to be left for mature consideration at the later stage of trial (see *American Cyanamid*, *Keet Gerald*, *Sarkawi*, *SV Beverages Holdings Sdn Bhd & Ors v Kickapoo (M) Sdn Bhd* [2008] 4 MLJ 187; [2008] 3 AMR 408, *Zaidin Abd Ghani @ Zaidin Stothard v Raja Raman Nair @ Mohd Yusof & Ors* [2001] MLJU 227; [2001] 3 AMR 3032 and *Law and Practice of Injunctions in Malaysia* at pp 10–11).

The plaintiffs' submissions

[74] Mr Teh Eng Lay fervently submitted that there is a legitimate grievance on the part of the plaintiffs against the defendants that constitutes bona fide serious issues to be tried, namely as to:

(a) whether there is a valid planning permission for the proposed project;

(b) whether there is a valid approval for the defendants to carry out the alleged works; and

(c) the safety and stability of the slopes.

[75] In so far as the issue in subpara 74(a) above is concerned, it was contended, among others, that the defendants have not shown any valid planning permission in Form C(1) of the First Schedule as required by sub-r

9(1) of the Planning Control (General) Rules 1998 (Phg PU8) for the proposed project. The only Form C(1) produced is dated 3 September 2015 but the plaintiffs contend that it is for an entirely different project in 2015 and that it has expired on 2 September 2016. Furthermore, from MPB's response for the Appeal Board case, it was confirmed that Form C(1) has not been issued to the defendants for the proposed project.

[76] With regards to the issue in subpara 74(b) above, it is the plaintiffs case that at the time of the alleged works in December 2019 and up until the injunction application, the defendants have not obtained or failed to obtain a valid approval for building plans under s 70 of the SDBA 1974 or to commence earthworks under s 70A of the same Act for the proposed project. The crux of the contentions is that whatever purported planning permissions and building plans approval shown by the defendants have lapsed and expired and/or that the approvals are subject to conditions which have not been fulfilled.

[77] Consequently, the Form B notices issued pursuant to by-law 5(4) of the Earth Works (Bentong District Council) By-Laws 1998 (Phg PU 28/1998) for earthworks following D3's letter dated 16 October 2017, and pursuant to by-laws 22(1) and (2) of the Uniform Building (Pahang) By-Laws 1996 (Phg PU4/1996) for building works following D5's undated letter which was received by MPB on 16 March 2018 (see exh 'KSK4', encl 35), are invalid and unlawful. The plaintiffs took the position that any work carried out following the Form B notices constitute illegal construction works and contravenes s 26 of the TCPA 1976 and s 70 of the SDBA 1974.

[78] In addition, the plaintiffs argued that the defendants have contravened the said guidelines which prohibits any development on Class III and Class IV slopes situated above 1000m above the sea level except for infrastructure works of national interest such as roads, tunnels, bridges, telecommunications and electrical but of low intensity. It was submitted that r 5 in the Planning Control (Development on Hill Land, High Land and Hill Side) Rules 2019 (Phg PU 35) requires the local authority to consider the said guidelines when managing an application for planning permission for development of hill land, high land and hill side area.

[79] Further, the plaintiffs' counsel referred to the Third National Physical Plan, the Pahang State Structure Plan 2050 and the Draft Local Plan of Bentong Municipal Council 2035 which recognised that areas above 1,000 meters above sea level or above 1,000 meter contours, including those in Genting Highlands, as an Environmentally Sensitive Area ('ESA') Level 1. As a result, the said guidelines are again, applicable and the court was urged not to allow the defendants to proceed with the alleged works and the proposed project pending the full trial of this action.

[80] Apart from breach of statutory duties as submitted above, the plaintiffs highlighted the causes of action that arose whereby each of them is said to raise bona fide serious issues to be tried:

(a) the cutting of the toe of the slopes and removal of the earth and mineral thereof is, and will be, depriving the plaintiffs and their lands from sufficient right to support of land contrary to the legal duty on the defendants to provide, or not to disturb, the support for a neighbour's land;

(b) the defendants have committed trespass to the plaintiffs' lands including the private road with the defendants' heavy machineries and construction vehicles;

(c) the works by the defendants have created nuisance and will continue to interfere with the right and enjoyment of lands by the plaintiffs; and

(d) the defendants are negligent for not exercising their duty of care and relevant skills to ensure the development is lawful, safe and proper.

The defendants' submissions

[81] All of the plaintiffs' contentions were vehemently denied by the defendants. The defendants asserted that valid approvals were obtained by the D1 and D2 from MPB from the very beginning and are still subsisting as tabulated below:

No.	Date of Approval	Date of MPB's letter	Purpose of the Approval	Exhibits
1	8 July 2015 — OSC Committee Meeting 13/2015 (Original planning permission)	3 September 2015	Planning permission	'KSK 1', encl 35
2	15 April 2016 — OSC Committee Meeting 7/2016 (first amendment as allowed under sub-ss 22(3) and 24(1) TCPA 1976)	20 April 2016	To amend the title of the application from 'pangsapuri perkhidmatan' to 'suites'	'KSK2', pp 8–11, encl 35

3	28 October 2016 — OSC Committee Meeting 20/2016 (Second amendment)	10 November 2016	To amend the plot ratio from 1:5.9 as per the original approval to 1:8	'KSK2', pp 12–18, encl 35

[82] According to the defendants, the plaintiffs have full knowledge of the planning permission and the subsequent amendments to the same because all the three letters issued by MPB as aforementioned were copied to D2 and the Manager of Genting Utilities & Services Sdn Bhd. Moreover, the plaintiffs' representative, Dato' Sri Kay Prakash, D2's Vice President, Corporate Relations & Communication had served as one of the committee members of the OSC at the material time.

[83] The only objections raised by the defendants to the proposed project were conveyed to MPB vide letters dated 8 May 2015 and 3 October 2019 as shown in 'KSK23', encl 114. However, no appeals were filed by the plaintiffs against the approvals given by MPB.

[84] The defendants refuted the plaintiffs' submissions regarding the Form B notices on the ground that the second amendment to the planning permission is valid and subsisting. It was emphasised that 'Diluluskan Bersyarat' or 'Diluluskan Dengan Pindaan' is part of the MPB's standard procedure for full approvals to be given.

[85] The attention of the court was also drawn to the fact that the OSC Committee Meeting 23/2017 held on 22 December 2017 had approved the Building Plan for Phase 1 of the proposed project and this was conveyed vide MPB's letter dated 7 March 2018 (see exh 'KSK3', encl 35). Thereafter, the defendants' applications for various licenses to proceed with the proposed project were approved by MPB.

Analysis and findings of the court

[86] For ease of reference, the relevant statutory provisions are quoted below:

The TCPA 1976

2 Interpretation

(1) In this Act, unless the context otherwise requires —

A ...

'planning permission' means permission granted, with or without condition, to carry out development;

...

B 22 Treatment of applications

(1) As soon as possible after the receipt of an application for planning permission, or, if the application is one to which subsection 21(6) applies, as soon as possible after the expiry of the period within which objections may be C made or, if objections have been made, as soon as possible after the objections have been dealt with under subsection 21(7), the local planning authority shall decide on the application for planning permission.

(2) In dealing with an application for planning permission, the local planning authority shall take into consideration such matters as are in its opinion D expedient or necessary for proper planning and in particular —

...

(aa) the direction given by the Committee, if any;

...

E

(3) After taking into consideration the matters specified in subsection (2), the local planning authority may, subject to subsection (4), grant planning permission either absolutely or subject to such conditions as it thinks fit to impose, or refuse to grant planning permission.

F (4) The local planning authority shall not grant planning permission if —

...

(aa) the development in respect of which the permission is applied for would contravene the provision of paragraph (2)(aa); or

G ...

23 Appeal against decision of local planning authority

(1) An appeal against the decision of the local planning authority made under subsection 22(3) may be made to the appeal board within one month from the H date of the communication of such decision to him, by —

...

(b) a person who has lodged an objection pursuant to subsection 21(6) and is aggrieved by the decision of the local planning authority in relation I to his objection.

...

24 Lapse of planning permission

(1) A planning permission granted under subsection 22(3) shall, unless

extended, lapse twelve months after the date of the grant thereof if, within that time, the development had not commenced in the manner specified in the planning permission.

(2) Subsection (1) shall not apply to a planning permission that expressly states that the development for which the planning permission is granted does not involve any building operation.

(3) On an application being made in that behalf in the prescribed manner before the planning permission lapses, the local planning authority may, on payment of the prescribed fee, grant an extension or further extension of the planning permission.

(4) A planning permission extended under subsection (3) shall, unless further extended, lapse twelve months after the date of the extension thereof if, within that time, the development had not commenced in the manner specified in the planning permission.

(5) In granting an extension or further extension of a planning permission under subsection (3), the local planning authority may impose such conditions on the planning permission as it thinks fit or vary the conditions originally imposed; and shall apply with the necessary modifications to the imposition or variation of conditions under this section as it applies to the imposition of conditions under subsection 22(3).

The SDBA 1974

70 Notice of new buildings

(1) No person shall erect any building without the prior written permission of the local authority.

...

(9) Notice of commencement of resumption of building operations

No person shall commence the erection of a building or resume the erection of a building in any case where the work of erection has been suspended for a continuous period exceeding three months unless —

> (a) such work is commenced or resumed, as the case may be, within twelve months from the date on which the plans and specifications of such building were approved by the local authority; ...

...

70A Earthworks

(1) No person shall commence or carry out or permit to be commenced or carried out any earthworks without having first submitted to the local authority plans and specifications in respect of the earthworks and obtained the approval of the local authority thereto.

117 Licences to be discretionary

...

(3) Save as otherwise provided any licence granted or renewed in pursuance of this Act or any by-laws made thereunder may be for such period not exceeding twelve months as the local authority thinks fit.

...

(7) In this section 'licence' includes any approval, consent permit, permission, authorization or licence which may be granted in pursuance of this Act or any by-laws made thereunder.'.

Uniform Building (Pahang) By-Laws 1996 [Phg PU 4/1996]

22 Notice of commencement or resumption of building operations

(1) Notice of the intention to commence or resume the erection of a building required under subsection 70(9) of the Act shall be made in Form B as set out in the Second Schedule to these Bylaws and shall include particulars of the intended work.

(2) If the work is not commenced or resumed on the date given in such notice, a further notice in Form B as set out in the Second Schedule to these By-laws shall be given before the work may be commenced or resumed.

Planning Control (General) Rules 1998 [Phg PU8]

9(1) A planning permission shall be in Form C(1) of the First Schedule.

Planning Control (Development on Hill Land, High Land and Hill Side) Rules 2019 [Phg PU 35]

3 Application for planning permission regarding development of hill land, high land and hill side area

(1) These Rules shall apply to application for planning permission for development involving the area of hill land, high land and hill side as follows —

...

(b) specifically for the districts of Cameron Highlands, Genting Highlands, Bukit Tinggi and Janda Baik, all municipal development applications at the hill side area slopes of 25 degrees above with development plan of density of 20 units/acres above or a plot ratio of 1:3 above;

...

5 Treatment of applications

(1) In managing the application under rule 3, other than the matters prescribed under subsection 22(2) of the Act, the local planning authority shall take the consideration to —

(a) the planning guidelines of the hill area, high land and surrounding areas provided by the Town and Country Planning Department of Peninsular Malaysia in 2009;

...

(4) The local planning authority shall in the course of the application under paragraph 22(2A)(c) of the Act, involving the apex or hill side designated as a sensitive environmental area by the development plan; seek advice from the National Physical Planning Council if the development includes —

(a) slopes area of 25 degrees and above; and

(b) any other relevant criterias as determined by the National Physical Planning Council.

...

[87] I have carefully considered the chronology of events and documentary evidence consisting of letters issued by MPB to convey the decisions of the OSC Committee Meetings; Form C(1) dated 3 September 2015; correspondence regarding the application for approval of earthwork plan and issuance of Form B for earthworks and building works; and correspondence relating to *Laporan Cadangan Pemajuan* ('LCP') (see the exhs in encl 35, 'KSK10' and 'KSK11' in encl 49, 'IL62' in encl 125, 'IL102' in encl 198 and 'IL121' in encl 207) as tabulated in para 37 of the plaintiffs' written submissions and the defendants' responses which were also tabulated in para 9 of the defendants' executive submissions, and the flowchart illustrating the relationship of each purported planning permission and/or approvals in para 68 of the plaintiffs' written submissions in reply, and my findings are set out below:

(a) the said guidelines had come into effect on 14 October 2009 vide 'Pekeliling Ketua Setiausaha Kementerian Perumahan Dan Kerajaan Tempatan Bilangan 6 Tahun 2009' ('said circular'), the application of which was extended to all State authorities and local authorities and have been adopted by the Pahang State Planning Committee in its meeting held on 8 December 2009 and by the State EXCO Meeting on 24 February 2010 (see exhs 'IL22', 'IL23' and 'IL24', encl 5). According to the said guidelines:

Ketinggian dibahagikan kepada 4 kategori:

(i) Tanah Rendah (< 150 m)

(ii) Tanah Bukit (150m–300m)

(iii) Tanah Tinggi (300m–1,000m)

(iv) Gunung (1,000m)

and slopes are classified as follows:

Class I : < 15°

Class II : ≥ 15° to < 25°

Class III : ≥ 25° to < 35°

Class IV : ≥ 35°

(see too, paras 3(1)(b) and 5(1)(a) and sub-r 5(4) of the Planning Control (Development on Hill Land, High Land and Hill Side) Rules 2019 (Phg PU 35));

(b) not all the applications and/or submissions made by the defendants to MPB and enclosures to the letters from MPB are exhibited. There are gaps in the documentation as to the chronology of events. The material documents are in the possession of the defendants. In fact, the court expert had to constantly apply for the relevant documentation for purposes of performing the scope of tasks. Each time that such request was made, Dato' Jasbeer would inform the court that 'Whatever documents we have, we have given to Dr Ooi'. However, as the NOP and correspondence would show, there were repeated applications made by the court expert for documents and if the learned counsel's representation is true, there would surely be no necessity for Dr Ooi to make recurrent applications.

Most glaringly, the defendants failed to exhibit the purported Form C(1) dated 10 November2016. The defendants' solicitors attempted to introduce this document by way of their letter dated 29 May 2021 on the reason that it was 'inadvertently left out' wherein a copy of the said form was enclosed as 'Annexure 1'. However, the court rejected 'Annexure 1' as evidence in the absence of an affidavit affirmed by the defendants (see *Bee Ya Hock @ Beh Ah Hock v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* [1994] MLJU 85; [1994] 2 CLJ 753, *Ng Hee Thoong & Anor v Public Bank Berhad* [1995] 1 MLJ 281, *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 and *Natsafe (M) Sdn Bhd v Loi Teak Kuong* [2005] 6 MLJ 454; [2005] 2 CLJ 285).

This omission reinforces the doubts that I have as to whether all relevant applications by the defendants to MPB and the respective approvals, decisions or replies by MPB are before the court. Therefore, I am unable to ascertain whether the facts as averred by the plaintiffs or the defendants on the issue of validity of the planning permission and other approvals have been proven on a balance of probabilities;

(c) it is observed that in the OSC Committee Meeting 20/2019 held on 24 October 2019 to discuss regarding 'Permohonan Kebenaran Merancang Pindaan Pendirian Bangunan Bagi Pelan Yang Diluluskan Pada 10 November 2016 ...', the Town Planning Department of MPB commented that 'Permohonan ini hendaklah diproses sebagai permohonan baru atas rasional merujuk kepada asas pertimbangan di perkara 2.1 di atas.'. The basis of consideration in the said para 2 January

is not made known. MPB's Department of Building Control gave the comment that 'Kelulusan KM asal telah luput validasi dan pemohon hendaklah mengemukakan permohonan sebagai permohonan baru.'. Nevertheless, the decision of the OSC Committee Meeting is 'DILULUSKAN DENGAN PINDAAN (Pihak tuan diberi tempoh 28 hari dari tarikh surat ini untuk mengemukakan semula pelan-pelan yang telah mematuhi ulasan-ulasan teknikal)'. This brings me to another unsatisfactory aspect of the presentation of the defendants' case in the injunction application which is the failure to show that they have complied with all conditions imposed by MPB to its satisfaction;

(d) in the letter dated 26 February 2020 issued by the Pahang Department of Environment (exh 'KSK6', encl 35), D1 was informed that:

> ...
>
> 2. Sukacita dimaklumkan bahawa setelah meneliti dan mengkaji laporan pengurusan alam sekitar yang telah dikemukakan, Jabatan ini meluluskan pelan pelan tersebut dan mengambil maklum bahawa laporan ini hanya untuk Fasa 1 sahaja.
>
> ...
>
> 4. Pihak tuan juga diingatkan supaya sentiasa mematuhi semua syarat kelulusan EIA yang telah diluluskan no surat rujukan AS63000/160 Jilid2 (33) bertarikh 18 September 1992 serta Akta Kualiti Alam Sekeliling, 1974.

The 'syarat kelulusan EIA' was given in 1992 whereas the particulars of the proposed development have seemingly evolved from a project of six blocks of buildings to eight, ten and 14 blocks consisting of different components, number of storeys and phases of development between the period from July 2015 until September 2020;

(e) in the *afidavit bantahan responden* affirmed by Akhbar Zahim bin Said, *Pegawai Perancang*, MPB on 2 September 2020 (exh 'IL72', encl 141) for the appeal board matter, the deponent stated, inter alia, that:

> 4. Pada asasnya, saya menyatakan bahawa Rayuan yang dibuat oleh Perayu adalah tidak menepati peruntukan Seksyen 23(1) Akta Perancangan Bandar dan Desa 1976 apabila telah memfailkan Notis Rayuan diluar masa yang dibenarkan iaitu melebihi tempoh satu (1) bulan dari tarikh kelulusan Responden melalui surat kepada pihak Pencelah iaitu GM Aero Support Sdn Bhd bertarikh 24 October 2019.
>
> ...
>
> 5. Kemudian, pada 13 December 2019 atas rayuan pihak Pencelah untuk pematuhan syarat-syarat teknikal dan lanjut tempoh, Responden telah hanya memberikan kelulusan bersyarat kepada Pencelah.
>
> ...

> 6. Saya menyatakan bahawa Responden telah memberi notis peringatan pertama kepada pihak konsultan, iaitu Zahiruddin Town Planning Services yang mengendalikan permohonan Pencelah bahawa mereka telah gagal mematuhi syarat yang ditetapkan sepertimana dalam surat bertarikh 13 December 2019. Responden telah jelas menyatakan bahawa kegagalan Pencelah dan/atau pihak konsultan memberi maklumbalas dalam tempoh empat belas (14) hari, permohonan kebenaran merancang tersebut akan ditutup failnya.
>
> ...
>
> 7. Saya menyatakan juga bahawa pihak konsultan telah diberi peringatan kedua berkenaan perkara yang sama melalui surat bertarikh 29 January 2020.
>
> ...
>
> 8. Sehingga affidavit ini diikrarkan, saya menyatakan bahawa tiada surat kelulusan penuh yang dikeluarkan oleh Responden bagi permohonan oleh Pencelah tersebut.
>
> The second sentence in para 3 in MPB's first and second reminder letters dated 6 January 2020 and 29 January 2020 are the same ie 'Sekiranya tiada tindakan, permohonan ini akan ditutup fail kerana gagal mematuhi tempoh yang diberikan, dan pihak tuan perlu mengemukakan semula permohonan dengan bayaran fi proses yang baru sekiranya masih berminat untuk meneruskan cadangan ini pada masa akan datang.

Based on para 8 of Akhbar Zahim's affidavit, it appears that the defendants did not provide the feedback and take the necessary action within the stipulated time;

(f) there are bona fide serious issues to be tried as to whether there is a valid planning permission for the proposed project and whether there is a valid approval for the defendants to carry out the alleged works. The issue as to whether whatever works carried out by the defendants to date are illegal or otherwise can only be answered after the full trial of this suit where evidence from the representatives of MPB would throw more light on the matter; and

(g) the stability of slopes is one of the serious issue to be tried as evidenced by the divergent opinions of the experts (see too, the analysis under the second and third issues below). Yet again, this issue can only be determined, with the assistance of the court expert, after the full trial.

[88] In view of all the foregoing reasons, the plaintiffs have raised valid issues to be tried surrounding the planning permission and approvals from MPB, the legality of the alleged works and the stability of the slopes.

[89] Having found that there are serious questions to be tried, I now move on to the next step of the inquiry which is whether the plaintiffs could be adequately compensated in damages.

Second issue: are damages an adequate remedy?

The plaintiffs' submissions

[90] The crux of the plaintiffs' submissions on this issue is that damages is not an adequate remedy because there is a serious threat to public safety and human lives. Monetary damages would not compensate for any irreparable damage and loss to human life if this can be prevented.

[91] Learned counsel for the plaintiffs further argued that even if the enquiry is limited to the losses to land and damage to the First World Complex, D1 is not in a position to pay compensation as there is evidence to show that D1 had obtained friendly loans from certain individuals in the total sum of RM50m for which PT24116, PT24117 and PT24118 have been charged (exhs 'IL47', 'IL48' and 'IL49', encl 5). D1 has also created another charge over PT24118 on 13 February 2020 and raised RM40m by selling PT24119 by way of an option to purchase (exhs 'IL15' and 'IL50', encl 5).

[92] It was contended that damages would be an adequate remedy to the defendants because any delay to the proposed project can be compensated by monetary damages. However, if the construction works are proven to be illegal then no damages are recoverable by the defendants.

The defendants' submissions

[93] Dato' Jasbeer reiterated that, contrary to the plaintiffs' allegations, there is a valid planning permission and valid approvals for the proposed project and, to date, the slopes remain intact. Hence, the so-called 'imminent danger' is merely a facade to eliminate commercial competition as the plaintiffs have not vacated the buildings and roads at the top of Genting Highlands for public safety at any material point in time. He stressed that it is the defendants who have been suffering and will continue to suffer grave prejudice and huge monetary loss as the defendants have invested a lot of money, effort and work to commence the proposed project only to be halted by the ad interim injunction order.

[94] Nevertheless, the defendants gave an undertaking that they will not carry out any construction works for Phase 2 and Phase 3 of the proposed

project and prayed that the ad interim injunction order be lifted for Phase 1 to enable the defendants to carry out drainage and slope soil strengthening works until further order of the court.

Analysis and findings of the court

[95] In their submissions, the plaintiffs had referred to the case of *Pekeliling Triangle Sdn Bhd & Anor v Chase Perdana Bhd* [2003] 1 MLJ 130 where at p 143, the Court of Appeal elucidated on the test that has to be applied in the enquiry as to whether damages would provide an adequate remedy for the plaintiff in these words:

> *First, the learned judge must be satisfied that the plaintiff would suffer an irreparable injury or that the plaintiff could not be adequately compensated in damages before proceeding to consider other relevant matters on the balance of convenience*. This step is in consonance with what was said by Gopal Sri Ram JCA in *Keet Gerald Francis Noel John* ... in para (2) cited above, couched in the phrase 'He must take into account all relevant matters, including practical realities of the case before him ...' ... *The second step is if damages would not provide an adequate remedy for the plaintiff in the event of it succeeding at the trial, the learned judge should then consider whether that if the defendants were to succeed at the trial in establishing their rights to do that which was sought to be restrained, they would be adequately compensated under the plaintiff's undertaking as to damages to the loss they would have sustained by being prevented from doing so between the time of the application and the time of the trial*. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction. *The third step is if there was doubt as to the adequacy of the respective remedies in damages available to either party or to both then only the judge should proceed to consider the question of balance of convenience. And the last step is where other factors appeared to be evenly balanced the question of the preservation of the status quo would then come into play*. (Emphasis added).

[96] The plaintiffs had additionally cited the decision of Street CJ in *McCarty v The Council of the Municipality of North Sydney* [1918] 18 SR NSW 210 which had illuminated on the meaning of 'irreparable damage' as 'an injury of such a character not that there would be no physical possibility of repairing, but that it would be a very grievous injury indeed' and it is 'simply an injury of so serious a character that damages would not be an adequate compensation, and that on this ground a party should not be compelled to submit to it even for a short period and to take his compensation in the shape of damages'.

[97] I have carefully scrutinised the affidavit evidence and it is my finding that:

(a) for reasons as given earlier, the said guidelines are applicable in this case;

(b) the LCP dated September 2019 states that the site for the proposed project 'mempunyai ketinggian dari aras laut antara 1,564 m hingga 1,620m' and shows that 88.8% of D1's lands is on Class III slope (31.4% or 12,850 m2) and Class IV Slope (57.4% or 23,472 m2). The slopes exceed 60m. The proposed project comprises ten blocks of high-rise buildings out of which eight blocks will have 77-storeys buildings;

(c) the proposed project is located near to the Bukit Tinggi fault line and within the same slope corridor where a massive slope failure and landslide occurred on 5 November 2019 in the vicinity of the Amber Court Apartments which is located north-west of PT24117 and Lot 9574 ('5 November2019 landslide'; a compact disc containing the video recording of the incident was submitted as exh 'IL46' in encl 5). The 5 November 2019 landslide happened even though no excavation, piling, slope cutting or other works were being carried out in the area;

(d) the plaintiffs' objection is to the whole of the proposed project. The court expert has been appointed to assess the stability of the slopes in a holistic manner. There is no clear evidence to show where on the land that Phase 1 ends and Phases 2 and 3 starts. The fact that the development of Phase 1 is on a plateau was not affirmed in any of the defendants' affidavits. However, from the presentation by the defendants' experts (exh 'IL115', encl 207), it is evident that part of the Phase 1 buildings will sit on the slopes and indisputably, Phase 1 works have resulted in slope cutting. In Figure 8: Indication of Slope Failures at Lower and Mid-Side of the Slope in Arup's report, slop failures are illustrated as cutting through the surface at the flat ground. Slope failures do not choose a particular phase of a project for it to occur. As submitted by the plaintiffs, whichever phase of the proposed project as identified on paper is meaningless in reality; the crucial fact is that they are all under one slope corridor;

(e) at this stage of the proceedings, the court is not to make any conclusive determination in relation to the diametrically opposed views given in Arup's report, Asbi's report, the plaintiffs' rebuttal reports and the defendants' rebuttal reports except to observe that:

(i) in Arup's report, it was found that the Factor of Safety ('FOS') of the global slope stability is 1.18, which is below the current safety standards, and that the slope stability would become very sensitive in the situation of further slope cutting/ excavation activities at the toe of the slope. Further, with extreme rainstorm events and prolonged rainfall, the FOS of the slope would deteriorate even more and put the overall slope stability in the extreme high risk;

(ii) in Asbi's report, high ground water table/pore water pressure was

found to be present within the slopes as evident by the presence of water seepages and swampy grounds throughout the site. High ground water table/ pore water pressure is a main triggering factor of landslide. The cutting of the slope at its toe will reduce the stability of the cut slopes and the 'risk of landslide is real and high, and its occurrence is very probable'. It was proposed that the design and construction of the proposed project be scrutinised in terms of the slope's short term and long term global stability with emphasis on the need for a long term plan for the future maintenance of the slopes and drainage system;

(iii) in Dr Chin's Report, it was opined that Arup's report had made an incorrect assessment which led to an incorrect conclusion as regards the stability of the slope next to First World Hotel. It was contended that if the assessment in Arup's report is correct then it is Arup's professional responsibility to immediately advise/inform the relevant authorities and the Genting Group of the impending safety concern and to evacuate/vacate the buildings concerned and close a section of the road for public safety reasons; and

(iv) in Ir Krishnan's Report, it was concluded that the slopes possess adequate safety margin against any impactful slope instability that can have detrimental impact to life and/ or property. All critical failure modes examined showed a minimum FOS greater than 1.30 as required by the Public Works Department's standards. The contentions and assertions made by the plaintiffs' experts on the impending or extremely threatening state of collapse of the slope are said to have no rational basis and are founded on mere feelings and expressed opinions without any scientific merit.

At the time of writing of these grounds of judgment, the court expert has completed the scope of tasks and affirmed an affidavit on 16 December 2021. His report is in exh 'A1' of the affidavit (encls 467–478). This report together with all the other oral and documentary evidence will be presented at the trial for full consideration. Until then, issues as to whether sufficient slope strengthening work and stabilisation work have been, or will be, carried out by the defendants and whether the proposed project is 'absolutely safe' remain open.

Nonetheless, based on the affidavit evidence up to the date of hearing of the injunction application, I am of the considered view that, if the alleged works are allowed to continue, the possibility of slope failure and a landslide cannot be dismissed. As the expression goes, 'Man proposes, and God disposes'. It would be wrong for me to treat the assessments made by the plaintiffs' experts as being fanciful. The risks are present, and they are real and it is for this reason that the plaintiffs'

submissions for a *quia timet* injunction in order to prevent an injury from occurring and to preserve the *status quo ante*, are not misplaced. Any argument by the defendants that to date, the slopes have not collapsed and thus there is no real and imminent danger must be rejected. The material time to consider is at the time when the plaintiffs applied for the ad interim injunction order. At that time, the court was satisfied that the alleged works posed a threat to the stability of the slopes and at the hearing of the injunction application, the defendants have not convinced the court that a different conclusion is now justified (see *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90, *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 271, *Interstate M & E Sdn Bhd & Ors v Fore-Sight Trading Sdn Bhd & Ors* [2007] 6 MLJ 677 and *Lembaga Air Perak v Ding Keng Long & Ors (Pentadbir Tanah Manjung & Anor, third party)* [2019] 8 MLJ 63); and

(f) in *Chua Kim Suan (administratrix of the estate of Teoh Tek Lee, decd) & Anor v Government of Malaysia & Anor* [1994] 1 MLJ 394), the Supreme Court held that any claim for loss of earnings from any illegal source should not be allowed in the ground that it is against public policy. By analogy, if the construction works are proven to be illegal, it is likely that the defendants claim for damages cannot succeed.

[98] Premised on all the above-mentioned findings, the plaintiffs have established that there is a real and imminent danger of loss of the proper or sufficient vertical or lateral support to the land in Lot 9574, especially the lateral land along its north-east boundary adjoining and bordering PT 24117, PT 24118 and PT 24119, and damage to the First World Hotel, the surrounding properties, infrastructures, environment and the private road. Damages are clearly not an adequate remedy in these circumstances.

[99] Moreover, it is recognised that there may be cases where the injustice to the plaintiff is so manifest that the court would be entitled to make an order to dispense with the usual undertaking as to damages (see *Keet Gerald Francis* at p 207). The plaintiffs submitted that the instant case is one such case. I agree.

[100] It is plainly obvious that this case involves issues of public safety and the need to safeguard human lives and properties from harm, damage or losses which could ensue if the alleged works are allowed to continue. This is an appropriate case for the usual undertaking as to damages to be dispensed with and was so ordered.

Third issue: where does the balance of justice and convenience lie?

[101] In answering this question, the court has to consider all relevant matters including the practical realities of the case and must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal (see *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241).

[102] Apart from the factor which has been discussed under the second issue and decided in favour of the plaintiffs, Mr Teh Eng Lay additionally highlighted that public interest and safety, and the defendants' conduct throughout the proceedings which constitute special circumstances, are relevant considerations that ought to be given weight by the court.

[103] In para 4 of the said circular, it is stated that the said guidelines was prepared 'berdasarkan prinsip-prinsip utama, iaitu keselamatan (nyawa dan harta benda), kesensitifan alam sekitar (kemampanan) serta memenuhi kehendak-kehendak perundangan'.

[104] There is no doubt that elements of public interest and safety are the foremost considerations in this case and would outweigh the monetary factors as submitted by Dato' Jasbeer.

[105] I am also in agreement with the plaintiffs' submission that the defendants' conduct, as discussed in the analysis of the issues in respect of the EOT application, would tilt the balance of convenience in favour of the grant of the injunction as prayed by the plaintiffs. The plaintiffs would suffer greater injustice if relief is withheld at this stage of the proceedings.

Mandatory injunction

[106] An interlocutory mandatory injunction before trial is sparingly granted. It would only be in exceptionally strong and clear cases that such an injunction is allowed in that the court is assured that a similar injunction would in all likelihood be granted at the trial and that it would be just and equitable that the plaintiff's interest be protected by the immediate issuance of an injunction lest it may result in irreparable injury and/or damage. Ultimately, the matter is to be determined based on the facts in each case (see, inter alia, *Tam Kam Cheong v Stephen Leong Kon Sang & Anor* [1980] 1 MLJ 36, *Gibb & Co v Malaysia Building SOCiety Bhd* [1982] 1 MLJ 271, *Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd* [1987] 2 MLJ 192, *Shamsudin bin Shaik Jamaludin v Kenwood Electronics Technologies (M) Sdn Bhd* [1999] 3 MLJ 438, *Ladang Tai Tak (KT) Sdn Bhd v Suppiah a/l Andy Thavar & Ors* [1999] 5 MLJ 257 and *Timbermaster Timber Complex (Sabah) Sdn Bhd v Top Origin Sdn Bhd* [2002] 1 MLJ

33; [2002] 1 CLJ 566 and *Law and Practice of Injunctions in Malaysia* (at pp 13–15)). A

[107] In support of the order sought in para (B) of encl 4, the plaintiffs cited two cases decided by the Supreme Court of British Columbia where a mandatory injunction to effect remedial measures to stabilise the slopes in question were granted ie *Culos Development Corp v High Street Developments* [1995] BCJ No 2194 and *Miklosko v Deol* [2011] BCSC 375. B

[108] Based on the affidavit evidence, including the photographs taken of the project site, it is indisputable that the toe of the Class III and Class IV slopes has been cut. The alleged works, especially the excavation of the land adjacent to Lot 9574 and at the toe of the slopes, where earth, minerals and rock were dug out and removed have definitely altered the topographical landscape of the area. The cut slopes were exposed and continue to be exposed. At the risk of repetition, the threat of slope failure is real. The risk of landslide(s) and collapse of the neighboring buildings, properties and roads, including the First World Hotel which is situated at the heart of Resorts World Genting and touted as the world's largest hotel offering an astronomical 7,351 rooms, cannot be dismissed as one that is negligible. The 5 November 2019 landslide is testament of the reality that a landslide can happen at any time, especially following heavy rainfall. The irreversible damage and injury to, not only the plaintiffs, but to members of the public and the surrounding infrastructure and environment if such an incident was to occur cannot be understated. C D E F

[109] Even though the legal requirements to grant a mandatory injunction at the interlocutory stage is more stringent than that for a prohibitory injunction, I am satisfied that a mandatory injunction should be granted in the circumstances of this case for the defendants to further strengthen the toe of the slopes on the terms and timelines as finally ordered by the court. The terms and time frames were finalised after the views from the learned counsels representing the parties were obtained. G

Conclusion H

[110] In sum, both prayers (A) and (B) in encl 4 were allowed. As for costs, the plaintiffs' counsel requested for a sum of RM200,000 in view of the numerous affidavits and written submissions which had to be prepared and not to mention, the strong opposition by the defendants to all the issues. It was argued that O 59 of the ROC 2012 applies and that costs ought to be given on an indemnity basis as the plaintiffs have incurred costs of more than RM200,000. I

[111] The defendants' counsel retorted that costs is in the discretion of the court and offered RM30,000 as a fair and typical amount of costs for an interlocutory application for an injunction.

[112] After having heard the brief submissions, the court ordered that costs of RM30,000 is to be paid by the defendants to the plaintiffs, subject to allocatur.

THE RECUSAL APPLICATION (ENCL 228)

[113] In this application, the defendants have sought for orders, among others, that Dr Ooi 'menarik dirinya dan/atau dikeluarkan ('recused')' as the court expert in this suit; the scope of tasks as per the court order dated 18 January 2021 'adalah tidak digunapakai dan/atau tidak diimplimentasikan' in these proceedings; and the tasks as set out in the scope of tasks are stayed and/ or postponed until the disposal of encl 228.

[114] The cause papers for the recusal application are listed below:

(a) the defendants' AIS affirmed by Khoh Siew Kim on 10 March 2021 (encl 229);

(b) the plaintiffs' AIR affirmed by Izwan bin Abdullah on 2 April 2021 (encl 255);

(c) the defendants' AIR affirmed by the same deponent on 23 April 2021 (encl 268);

(d) the defendants' additional AIR affirmed on 30 April 2021 (encl 273);

(e) the plaintiffs' AIR affirmed by the same deponent on 3 May 2021 (encl 276); and

(f) the defendants' AIR (No 2) affirmed on 10 May 2021 (encl 283).

[115] The grounds to support the application as stated in encl 228 are as follows:

(a) the court expert had acted unfairly and unjustly against the defendants;

(b) the court expert had violated the Professional Engineering Practice and Etiquette Rules in carrying out his responsibilities as a professional geotechnical engineer;

(c) the court expert is an expert in his field as a geotechnical engineer, however the defendants believe that he is not familiar ('tidak arif') with the approval process for the development of a project;

(d) the court expert had imposed unreasonable and/or excessive fee;

(e) the court expert has failed and/or refused to act as a reasonable and fair-minded person which is expected of a court expert; and

(f) there is a danger of bias against the defendants that will cause serious prejudice and justice and equality will not be achieved.

[116] Based on the defendants' written submissions, there appears to be an overlap in the contentions with regards to some of the grounds as above mentioned. Hence, in the subsequent paragraphs, I will address some of the grounds collectively wherever such an overlap occurs.

Whether the court expert had violated the Professional Engineering Practice and Etiquette Rules in carrying out his responsibilities as a professional geotechnical engineer

Whether the court expert is not familiar with the approval process for the development of a project

[117] The gist of the allegations hurled by the defendants against the court expert are that he:

(a) does not appear to have a proper understanding of the approval process in respect of project development because he kept insisting on obtaining the building plans for Phase 2 and Phase 3 of the proposed project although the defendants have explained that the building plans do not exist as the detailed architectural layouts are not developed at this conceptual stage;

(b) is overzealous in his conduct and had started work and presented on issues before the scope of tasks was finalised. He had insisted on certain works which are irrelevant to the purpose of his appointment to be included in the scope of tasks just because he had already done the work; and

(c) he has moved out of focus from the issue of the stability of the slope to the approval process and approvals obtained by the defendants.

[118] The plaintiffs went to great lengths to refute each of the defendants' allegations. Basically, it was argued that the defendants have made sweeping allegations against the court expert and that these are baseless and nothing more than afterthoughts.

[119] In so far as the contention of a violation of the Professional Engineering Practice and Etiquette Rules, patently, in my view, this has been thrown in without any substantiation as the defendants did not even bother to state what

rule was breached. How the rule was violated and when this occurred were never described in any of the affidavits.

[120] As for the issue of the court expert's understanding of the approval process, it is incontrovertible that he was appointed for his expertise in the geotechnical field. The scope of tasks begins with the statement that 'The court expert shall check the suitability and adequacy of the design on all geotechnical engineering works with particular reference to technical adequacy, constructability, long term safety and serviceability and *in compliance with the relevant legislation, codes of practice, standards and guidelines*'. It is crystalline that requesting for copies of all the approvals by the authorities is well within the scope of tasks to enable the court expert to make a conclusion on whether the design on all geotechnical engineering works is in compliance with, among others, the statutory requirements.

[121] It is the defendants' case that they have obtained all requisite approvals for the entire proposed project. It is therefore reasonable for the court expert to request for documentation as proof of these approvals. This is accentuated by the finding of this court in the injunction application that there is a serious question to be tried as to whether there is a valid planning permission and valid approvals in respect of the proposed project.

[122] Nevertheless, as submitted by the plaintiffs, it is recognised that the devastating Highland Towers incident on 11 December 1993 is a grim reminder that no matter what approvals are given on paper, these are not perpetual guarantees on the safety of hillside developments (see *Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors* [2000] 4 MLJ 200 (HC), *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567 (CA) and *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389 (FC)).

[123] With regards to the scope of tasks, I have reviewed the notes of proceedings ('NOP') for this case since it was called up for the first time for CM on 25 February 2020 and it is noted that the need for a court appointed expert was first raised at the very early stage of the proceedings ie during the CM for encls 1 and 4 on 28 February 2020.

[124] Subsequently, this matter was discussed during the CMs on 6 March 2020, 12 March 2020, 20 May 2020 and 17 July 2020 and by 17 July 2020, the parties agreed that Dr Ooi, who was the common candidate nominated by the parties, is to be appointed as the court expert with liberty to apply given to the parties and the court expert.

[125] The issue of Dr Ooi's scope of tasks was then addressed during the CMs on 7 August 2020, 27 August 2020, 27 October 2020, 9 November 2020, 25 November 2020 and 11 December 2020. The approach taken by the court in finalising the scope of tasks was by way of consensus of the parties. The defendants had agreed to this approach from the very beginning. Dato' Jasbeer himself said that, 'With a bit of time, it is likely that we can come to an agreement on the Scope of Works'. At the CM on 25 November 2020 and with regards to Dr Ooi's proposed amendments to the draft scope of tasks, Dato' Jasbeer said 'If that's Dr Ooi's proposals as the court expert, we are okay with it'.

[126] On 11 December 2020, ample opportunity was given to the parties and their respective experts to give their views on the scope of tasks.

[127] On 11 January 2021, after the presentation by the parties' experts, the proposed amendments to the scope of tasks prepared by the plaintiffs (in green and red) and the defendants (in purple and red) were before the court, to which Dr Ooi was asked to produce a clean copy on what he thinks should be in his scope of works.

[128] On 18 January 2021, the court went through the draft scope of tasks with the counsels and Dr Ooi and ultimately, the court decided on the final contents of the scope of tasks.

[129] In the light of the foregoing, I have no hesitation in concluding that the defendants' submissions on this matter are devoid of any merits.

Whether the court expert had imposed unreasonable and/ or excessive fees

[130] According to the defendants, the fees quoted by the court expert is extremely excessive and beyond the usual norm of the industry. The defendants expressed surprise and concern that the court expert has intimated on the need for a second site visit after the first visit on 16 September 2020 when no work, except as ordered by the court on 28 February 2020, has been carried out in compliance with the ad interim injunction order. The second site visit will entail payment of another RM50,000 to the court expert for his fees whereas other expert engineers are said to charge only RM5,000.

[131] The plaintiffs' response is placed under the umbrella of submissions that a litigant should not approbate and reprobate by adopting two inconsistent courses of conduct and that the defendants are estopped from questioning the remunerations. The plaintiffs invited the court to take judicial notice of the fact that, based on the registry at the website of the Board of Engineers, Malaysia, there are only 14 accredited geotechnical checkers in Malaysia. Dr Ooi; the plaintiffs' expert, Ir Mohd Asbi bin Othman; and the defendants' experts, Ir Dr

Chin Jhin Thiam, Ir Dr Gue See Sew and Ir Krishnan Raman are five of them. This shows that it is a very specialised expertise; a niche and it was contended that it is absurd to compare the remunerations to the industrial norms of charges of an engineer.

[132] I have given due consideration to this ground as submitted by the defendants and I have no difficulty at all in concluding that it is unfounded for the following reasons:

(a) the records show that the court expert had on 7 November 2020, 28 January 2021 and 9 February 2021 (see exhs 'IL(RA)7', 'IL(RA)8' and 'IL(RA)9', encl 255) corresponded with the solicitors for the plaintiffs and the defendants vide emails and, in the email dated 28 January 2021, the court expert said that '... I had submitted the table of my remuneration to the court and the parties' solicitors by my email of 7 November 2020. My recollection of the discussion on 18 January 2021 was that I was to; (1) fix a lump sum for the rated-items; and (2) submit an invoice for the first stage payment of 20%. In this respect, I have fixed lump sums for the rate-based items which bring the total lump sum for my remuneration/reimbursement to RM400,000'.

There were no complaints or objections by the defendants that the fees as proposed by the court expert are excessive and unreasonable. The defendants could have counter-proposed on any of the task descriptions and the rates in relation thereto but, for reasons best known to them, they kept silent;

(b) paras (3)–(5) in the order dated 18 January 2021 expressly provide, inter alia, that the court expert shall be paid jointly and severally by the plaintiffs and the defendants. There was, again, no protestations at all by the defendants on any aspect of the remuneration of the court expert. In para 3 of the letter from the plaintiffs' solicitors dated 25 March 2021 to the defendants' solicitors (exh 'IL(RA)10', encl 255), reference was made to para (3) of the order dated 18 January 2021 and the fact that the defendants' solicitors had earlier insisted on 10 working days to pay the defendants' half share of the initial 20% of the total lump sum remuneration/ reimbursement payable to the court expert. Apart from this, there were no other protests by the defendants on this matter;

(c) no evidence was adduced by the defendants as to the amount of fees which would constitute the 'usual norm of the industry'; and

(d) the same set of solicitors have appeared on numerous occasions for the parties and based on my recollection of their statements and submissions, and as confirmed by the NOP, the defendants had never raised any issue to the effect that the court expert's fees are unreasonable and/or excessive.

[133] In the upshot, it is my finding that the defendants had plainly accepted the rates of remunerations of the court expert and this ground is nothing but an attempt by the defendants to recant from the terms of appointment of Dr Ooi.

Whether the court expert had acted unfairly and unjustly against the defendants

Whether the court expert has failed and/ or refused to act as a reasonable and fair-minded person which is expected of a court expert

Whether there is a danger of bias against the defendants that will cause serious prejudice and justice and equality will not be achieved

[134] The common theme across the defendants submissions for the recusal application is that, if Dr Ooi is not recused as the court expert, there is a real danger of bias against the defendants and there will be severe prejudice to the defendants.

[135] The defendants admitted that initially, they had nothing against Dr Ooi to be appointed as the court expert. However, they contend that, upon observation of Dr Ooi's conduct, they harbor concerns about his independence and impartiality. In particular, the defendants cite the following conduct and/or statements by Dr Ooi to justify the assertion of biasness:

(a) the court expert had made the presentation on 25 November 2020 ('25 November 2020 presentation') without any prior notice and the defendants were caught by surprise. The court expert did not provide his slides to the parties before and after the 25 November 2020 presentation. The defendants were thereby prevented from conducting a detailed study and rebuttal of Dr Ooi's unfounded assertions and unfavorable remarks during the 25 November 2020 presentation as follows:

(i) reference was made to other areas which are outside and far-off from the boundaries of the proposed project to make inferences that the project site is unstable and to create concerns of potential land slips, thus prejudging the issue;

(ii) Dr Ooi had constantly used the word 'very threatening' and this prematurely implied that the proposed project will affect the safety of the buildings in Genting Highlands when the details, building characteristics and/or specifics of the proposed project have yet to be scrutinised and fully understood;

(iii) comments were made that there is no maintenance in respect of the existing drainage at the project site, however during the site visit on 16 September 2020, Dr Ooi said that 'there is no serious

environmental issue detected at the project site'; and

(iv) further reference and comparison were made to the Highland Towers incident when it does not have any connection with the proposed project which is developed based on solid engineering principles.

(b) the foundation plan for Phase 1 was provided by the defendants to the court expert at an earlier stage for information purposes so that the court expert has an appreciation of Phase 1 of the proposed project. However, even before the slides presentation by the parties as requested for by Dr Ooi during the site visit on 16 September 2020, Dr Ooi had prematurely formed an opinion that the foundation for Phase 1 was not robust without considering any detailed engineering calculations or analyses and the fact that Phase 1 is on a plateau.

[136] Dato' Jasbeer submitted that the 'real danger of bias' test as propounded in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65; *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449; [2002] 4 CLJ 309; *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293; [2006] 1 CLJ 577; *Cherie Booth QC v Attorney General, Malaysia & Ors* [2006] 6 MLJ 501; [2006] 4 CLJ 224 and *Menteri Hal Ehwal Dalam Negeri v Raja Petra bin Raja Kamarudin* [2009] 4 MLJ 484; [2009] 3 CLJ 513 is equally applicable in the instant recusal application. It was argued that Dr Ooi's opinion and/or findings will have a direct bearing on the findings to be made by the court and hence, it is of paramount importance that he too, should be fair, independent and unbiased.

[137] On the other hand, the plaintiffs, after examining the role of a court expert and contending that a court expert merely gives opinion evidence and is not an arbiter or decision maker, urged the court to find that the 'real danger of bias' test is applicable to judges but not to a court expert.

[138] Mr Teh Eng Lay, in his characteristically thorough manner of submitting the case for the clients, additionally argued, aside from relying on the legal principles of waiver and estoppel, that even if the 'real danger of bias' test is applicable to this case, the defendants have failed to discharge the burden of proving the same.

[139] The learned counsel had also immediately pointed out that the case of *Raja Petra Raja Kamarudin* as cited by the defendants' counsel had been set aside by the Federal Court for quorum failure as reported in [2018] supp MLJ 471; [2010] 4 CLJ 25.

[140] Dr Ooi was appointed as the court expert on 17 July 2020 (encl 129) pursuant to O 32 r 12 of the ROC 2012, which provides that 'If the court thinks it expedient in order to enable it better to determine any matter arising in proceedings in chambers, it may obtain the assistance of an assessor or expert pursuant to O 33 or O 40, as the case may be', and O 40 of the ROC 2012 which sets out the procedural matters pertaining to, among others, the appointment of the court expert.

[141] Order 40 r 1(1) of the ROC 2012 reads as follows:

> In any cause or matter in which any question for an expert witness arises, the Court may at any time, on its own motion or on the application of any party, appoint an independent expert or, if more than one such question arises, two or more such experts, to inquire and report upon any question of fact or opinion not involving questions of law or of construction.

[142] Sections 45–51 of the Evidence Act 1950 (Act 56) on 'Opinions of third persons' expressly permit experts to provide opinion evidence based on their specialised knowledge and skills.

[143] The Court of Appeal speaking through Vernon Ong JCA in *Batu Kemas Industri Sdn Bhd v Kerajaan Malaysia Tenaga Nasional Bhd* [2015] 5 MLJ 52 explained the duties and responsibilities of expert witnesses in the following illuminating passage:

> [35] ... *It is the primary duty of an expert to assist the court in arriving at the right decision*; even if he compromises the case of the party who called him and is paying for his services. It cannot be overemphasised that this duty overrides any obligation to the party from whom the expert has received instructions or by whom he is paid (O 40A r 2 of the Rules of Court 2012). Therefore, *the evidence of an expert should not only be independent but should also be seen to be independent. It is pertinent to add that the opinions of experts are relevant facts only insofar as they can assist the court in forming an opinion upon the issues in this case* (s 45(1) of the Evidence Act 1950).
>
> [36] What are the duties and responsibilities of expert witnesses? It is useful to consider what Ian Freckelton and Hugh Selby the authors of *Expert Evidence — Law, Practice, Procedure and Advocacy* (Lawbook Co 2005 (3rd Ed)) described as the most important enunciation of the duties and responsibilities of expert witnesses in the context of *National Justice Cia Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer* [1993] 2 Llyod's Rep 68 at pp 81–82 which has since been applied in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer* [1995] 1 All ER 577 at p 60:
>
> *The duties and responsibilities of expert witnesses in civil cases include the following:*
>
> *Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or to content by the exigencies of litigation (Whitehouse v Jordan* [1981] 1 WLR 246 at p 256-257; 1 All ER 267 at p 276 per Lord Wilberforce).

An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise (see *Polivitte Ltd v Commercial Union Assurance Co Plc* [1987] 1 Llyod's Rep 379 at p 386 per Garland J and *Re J* [1991] FCR 193 per Cazalet J). An expert witness in the High Court should never assume the role of an advocate.

...

[37] *As an independent aid to the court, it is therefore essential that an expert witness must possess and retain a standard of absolute personal integrity*. In this connection, Cazalet J in Re J, said:

> *Expert witnesses are in a privileged position: indeed only experts are permitted to give an opinion in evidence. Outside the legal field the court itself has no expertise and for that reason frequently has to rely on the evidence of experts. Such experts must express only opinions which they genuinely hold and which are not biased in favour of one particular party*. Opinions can, of course, differ and indeed quite frequently experts who have expressed their objective and honest opinion will differ, but such differences are usually within a legitimate area of disagreement. On occasions, and because they are acting on opposing sides, each may give his opinion from different basic facts. This of itself is likely to produce a divergence.

[38] Before the court can accept the testimony of the expert the competency of the expert witness must be established. In *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217 (SC), the Supreme Court made the following observations:

> First, does the nature if the evidence require special skill? Second, if so, has the witness acquired the necessary skill either by academic qualification or experience so that he has adequate knowledge to express an opinion on the matter under enquiry? The answer to both questions must necessarily depend on the facts of each particular case. The specialty of the skill required of an expert witness under s 45 would depend on the scientific nature and complexity of the evidence sought to be proved. The more scientific and complex the subject matter, the more extensive and deeper will be the court required to enquire into the ascertainment of his qualification or experience in the particular field of art, trade or profession. But in the final analysis in a non-jury trial, *it is for the trial judge himself as both judge of fact and law to determine the weight to be attached to such evidence notwithstanding the outstanding qualification or experience (or lack of it) of the expert*.

(See too: *Samundee Devan a/l Kerishnan Muthu v Public Prosecutor* [2009] 1 MLJ 697 and *Pembangunan Yasal Sdn Bhd v Teo Lee Chun @ Jenny Chin Lee Chu* [2011] MLJU 1169; [2011] 1 LNS 583). (Emphasis added.)

[144] Based on research conducted, there is no Malaysian case thus far where a party has sought to recuse a court expert. The plaintiffs' solicitors has turned to the English, Australian and Canadian courts and this resulted in the submission of the following cases.

[145] In *Nagel v Clay* [2020] FamCA 326, Harper J of the Family Court of

Australia said:

> [143] *But experts do not decide cases. For this reasons standard texts on evidence of longstanding reputation reject the existence of actual or apparent bias rules for expert witnesses*. For example, the learned authors of *Cross on Evidence* (*LexisNexis*, loose-leaf) at [29080], after referring to judicial statements emphasising the independent role of an expert, comment as follows:
>
> > These paragraphs are for the most part aspirational and ethical. A perceived failure to comply with them is damaging to the expert's credit. *But experts are not judges. No rules of law concerning actual or apparent bias apply in relation to them*. If there were, why would there not be equivalent rules applying to non-expert witnesses? Like expert witnesses, non-expert witnesses are subject to criminal sanctions for perjury, and they have a duty to the court to give truthful evidence which prevails over their own interests or those of friends, commercial allies, employees or relatives. But it does not follow that bias is a bar to admissibility.
>
> [145] In *Thompson v Platt* [2016] FamCA 1116 (Thompson), Tree J reviewed at some length the authorities concerning the operation of the bias principles on the evidence of family consultants. Consistently with the comments from *Cross on Evidence*, cited above at [143], he noted particularly the distinction between a judge as a decision-maker and a family report writer tasked with the role of assisting the court come to a decision. At [22] Tree J said:
>
> > There is no clear reason why those principles, which require natural justice to be afforded by decision-makers, should apply in totality, or perhaps even at all, in relation to the writer of a Family Report. *Such persons undertake no decision making; the decision making still resides with the court*. (Emphasis added.)

[146] The English Court of Appeal in *Regina (Factortame Ltd & others) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2002] 3 WLR 1104 opined that:

> [70] *This passage seems to us to be applying to an expert witness the same test of apparent bias that would be applicable to the tribunal. We do not believe that this approach is correct*. It would inevitably exclude an employee from giving expert evidence on behalf of an employer. *Expert evidence comes in many forms and in relation to many different types of issue. It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence*. Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management. In considering that question the Judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules. (Emphasis added.)

[147] The England and Wales High Court (Chancery Division) in *Meat Corporation of Namibia Limited v Dawn Meats (UK) Limited* [2011] EWHC 474 elucidated on the legal principles to be applied when the independence of

an expert witness is being challenged in these words:

> [45] The general principles which should be applied in cases of challenged independence are conveniently set out by Nelson J in *Armchair Passenger Transport Ltd v Helical Bar plc* [2003] EWHC 367*, as followed by Aikens J in Gallaher International Ltd v Tlais Enterprises Ltd* [2007] EWHC 464 (Comm) Nelson J said (at para 29):
>
> The following principles emerge from these authorities:
>
> (i) It is always desirable that expert should have no actual or apparent interest in the outcome of the proceedings.
>
> (ii) The existence of such an interest, whether as an employee of the parties or otherwise, does not automatically render the evidence of the proposed expert inadmissible. It is the nature and extent of the interest or correction that matters, not the mere fact of the interest or correction.
>
> (iii) Where the expert has an interest of one kind or another in the outcome of the case, the question of whether he should be permitted to give evidence should be determined as soon as possible in the course of case management.
>
> (iv) The decision as to whether an expert should be permitted to give evidence in such circumstances is a matter of fact and degree. *The test of apparent bias is not relevant to the question of whether or not an expert witness should be permitted to give evidence*.
>
> ...
>
> [46] I shall apply that approach, though I add a qualification of my own. *In some circumstances it might not be possible to determine with sufficient clarity whether an expert has a disqualifying connection at an interlocutory stage*. The facts may be in dispute; or the real extent of the interest or connection may not be sufficiently clear. In such cases (and as will appear, the present case is one of them) *the court may not be able to resolve the question of independence at the interlocutory stage, because the real facts and interest may require some teasing out in evidence. In those cases it may not be possible to determine the matter at the pre-trial stage*. It is obviously desirable to do so if at all possible so as to avoid the prospect of a party's important evidence being ruled out at the trial, with possible consequential adverse effects on the trial process or even unfairness in the decision-making process. But it may not be possible. *So I would not rule out the prospect of having to decide the point at a trial*. (Emphasis added.)

[148] The plaintiffs' counsel then referred to the decision by the Supreme Court of Canada in *White Burgess Langille Inman v Abbott and Haliburton Co* 2015 SCC 23 wherein it was observed that:

> [32] *Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be*

unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P Michell and R Mandhane, *The Uncertain Duty of the Expert Witness* (2005), 42 Alta L Rev 635, at pp 638–39. These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.

...

[36] Our court has confirmed this position in a recent decision that was not available to the courts below:

> It is well established that an expert's opinion must be independent, impartial and objective, and given with a view to providing assistance to the decision maker ... However, *these factors generally have an impact on the probative value of the expert's opinion and are not always insurmountable barriers to the admissibility of his or her testimony. Nor do they necessarily 'disqualify' the expert*. ... For expert testimony to be inadmissible, more than a simple appearance of bias is necessary. The question is not whether a reasonable person would consider that the expert is not independent. Rather, what must be determined is *whether the expert's lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case* ...

[149] *Neil v Zang* [2021] FamCAFC 30 is a case where the proceedings were transferred by the Federal Circuit Court of Australia to the Family Court of Australia and the former court had made orders appointing a psychiatrist to be chosen by the Independent Children's lawyer as the single expert witness in the proceedings. The father of the child alleged that the expert witness was bias against him. The Family Court said that this belief 'would most usually be a matter to be taken up in cross-examination of the single expert at trial, not the basis for his discharge and replacement'.

[150] Whilst the judgments as quoted above have illuminated on the approach taken in the other jurisdictions on issues revolving around experts and their opinions or evidence, particularly experts who are appointed by the respective parties, they are, of course, not binding on this court. The defendants did not respond to the case authorities as cited by the plaintiffs in their submissions in reply and must therefore be taken to agree with the propositions put forth by the plaintiffs based on the same.

[151] The plaintiffs have presented persuasive arguments to support the submission that the role of the court expert is as prescribed under O 32 r 12 and O 40 r 1 of the ROC 2012. The court expert is required to 'inquire and report upon' any question of fact or opinion and not involving questions of law. At this interlocutory stage of the proceedings, the defendants' belief of Dr Ooi's biasness and lack of independence does not justify an order to recuse or remove

Dr Ooi as the court expert. The court expert is obviously not an arbiter or a decision maker. The duty to adjudicate and adjudge the issues to be tried in this suit lies with the court.

[152] In the premises, the court finds and holds that the 'real danger of bias' test is not applicable to a court expert.

[153] Assuming that I am wrong in this conclusion, the 'real danger of bias' test was recently expounded by the Federal Court in *Public Prosecutor v Tengku Adnan bin Tengku Mansor* [2020] 5 MLJ 220. Nallini Pathmanathan FCJ in delivering the judgment of the court said:

> [12] The governing law in this country applies the test laid down in *Regina v Gough* [1993] AC 646 and is summarily stated to be a 'real danger of bias'. The test was first adopted in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65 by Edgar Joseph J in a judicial review case, reiterated in *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449; [2002] 4 CLJ 309, the only criminal case dealing with bias in the context of a habeas corpus application and *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293; [2006] 1 CLJ 577, another civil matter relating to striking out under O 18 r 19 of the RHC.
>
> [13] In all these cases the question before the court, as it is in this case is *whether, having regard to the facts and circumstances, there was a real danger of bias on the part of the learned trial judge when he heard the case involving the respondent?*
>
> ...
>
> [15] In *Sungai Gelugor* Edgar Joseph Jr FCJ explained that with this test, the o*pinion of the court substituted that of the reasonable man*. Secondly, the *real danger test* he said, was a *reasonable compromise between the 'reasonable suspicion' and 'real likelihood' of bias test meaning that the court was contemplating a lower standard than that a likelihood or probability of bias*. It required a 'real possibility of bias'. It is important to comprehend that this court did not state that it was imposing a 'very low' threshold.
>
> [16] Equally importantly the judge went on to state that *this was the preferred test as it would avoid the setting aside of judgments upon 'quite insubstantial grounds and the flimsiest pretexts of bias*'.
>
> [17] And in *Tan Heng Chew* the Federal Court speaking through Hamid Mohamed FCJ (later CJ) held that even though *R v Gough* had been refined in the UK in *Porter and another v Magill* [2002] 1 All ER 465, this was to ensure the law was in line with European jurisprudence, which was not applicable in Malaysia. More significantly, the court held that it was incumbent upon the court to be vigilant not to allow parties to engage in 'judge-shopping' under the guise of recusal applications.
>
> ...
>
> [28] There is a difference between a danger of real bias and a real danger of bias. So the Court of Appeal conflated the tests somewhat, by requiring any possibility of real bias, while *the correct test requires a real possibility of bias*. In so conflating the test,

the Court of Appeal applied a very low threshold, thereby committing an error of law.

[29] The real danger of bias does not prescribe a very low threshold of bias. What it does is to *apply a lower threshold than that of an apprehension of bias or likelihood of bias*, as stated by Edgar Joseph Jr J in *Sungai Gelugor*. But such a threshold does not automatically translate to an extremely low threshold. (Emphasis added.)

[154] Further, Mr Teh Eng Lay had cited the cases of *Save and Prosper Pensions Ltd v Homebase Ltd* [2001] L&TR 11, *AT&T Corp and another v Saudi Cable Co* [2000] 1 All ER (Comm) 201; [2000] BLR 293, *Sjee Engineering Sdn Bhd v Al-Ambia Sdn Bhd and another appeal* [2018] MLJU 888; [2018] LNS 922 and *Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Anor* [2005] MLJU 285; [2005] 1 LNS 290 to support his submission that the 'real danger of bias' test requires it to be 'real' in that it is 'not without substance' and not 'fanciful'; 'fanciful suppositions and mere suspicion' or 'unwarranted inferences, conjecture and suspicion' or 'surmise or mere conjecture' would be insufficient.

[155] Guided by the above exposition of the law, it is my considered view that the defendants have failed to establish a real danger of bias on the part of the court expert for the following reasons:

(a) the 25 November 2020 presentation:

I have reviewed the chronology of the proceedings up to 25 November 2020 and the recording of the 25 November 2020 presentation during the CM which was fixed on that date. The court expert had informed the court that he has prepared a power point presentation 'to give everyone a better idea as to what documents are lacking and why these are crucial, shows the relationship between the buildings, roads etc'. No objection, qualification or reservation was made by the learned counsels including those who represented the defendants. As such, the court had allowed Dr Ooi to proceed with his presentation which reflects his preliminary observations subsequent to the first site visit on 16 September 2020.

In my view, whatever that was said by Dr Ooi at the 25 November 2020 presentation does not tantamount to evidence of his biasness and/or lack of independence and impartiality or that he has pre-judged the matters which he is supposed to examine and report to the court. In fact, Dr Ooi's preliminary observations are indicative of some of the areas of concern, for example, the capacity of the drains and the surface drainage and water flow are towards the area of the development of Phase 1. By sharing his initial thoughts, the parties and their experts would have a better understanding as to the rationale for the request of certain documents from the parties and have the opportunity of addressing the issues arising. This is surely beneficial to the parties themselves.

Besides, as submitted by the plaintiffs, an analogy can be drawn from cases on applications for interlocutory injunctions where the courts have held that any comments made, or views expressed, by the judge in the course of the interlocutory proceedings cannot give rise to bias warranting a recusal of the judge from hearing the main action (see *Hock Hua Bank (Sabah) Berhad v Yong Liuk Thin & Ors* [1995] 2 MLJ 213, *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 and *Masyitah bt Md Hassan v Sakinah bt Sulong (Imelda Nasreen bt Nasruddin @ Balchin, putative contemnor)* [2021] MLJU 768). Similarly, any preliminary or tentative views stated by Dr Ooi should not, and do not, give rise to any danger of bias.

Furthermore, to set the record straight, on 25 November 2020, when the defendants' counsel requested for Dr Ooi's slides to be provided to him, the court did make an order for the slides to be supplied. However, on 11 December 2020, when Dato' Jasbeer repeated the request, Dr Ooi gave his justification in preferring to provide only the drone pictures but not the slides because he did not want to influence the parties' experts in their own assessment and presentation. I accepted Dr Ooi's reasoning and directed that he provides only the drone pictures to the defendants' solicitors by 15 December 2020.

Referring to the defendants' written submission, it is most erroneous for the defendants to contend that the 25 November 2020 presentation would have 'a unilateral influence on the findings of fact' by the court without having consideration of the defendants account of the facts. The findings of fact that will be made by the court will be based on the evidence presented at the full trial for this suit where, by that time, Dr Ooi's report would have been filed by way of an affidavit and the defendants' counsel will be given all the time that is needed to question Dr Ooi on his report;

(b) the 'very threatening' remark:

Contrary to the defendants' accusation that Dr Ooi had repeatedly used the words 'very threatening' and by doing so, he had pre-judged that the entire proposed project is very or highly threatening, I find that the words were used by Dr Ooi only once, namely at minute 34.52 of the video recording of the CM on 25 November 2020 and lines 2–6 at p 12 of the NOP as transcribed by the plaintiffs' solicitors:

> OTA: Then you see behind the background, these are all Genting's buildings.
>
> YA: Yes.
>
> OTA: So very threatening, you see. (Pointing to the multi-storey car park) Now this is the multi-storey car park.

Dr Ooi used the two words in reference to what is directly behind the planned multi-storey car park for the proposed project located on the

slopes, which is the First World Hotel and other buildings occupied by the plaintiffs. It is Dr Ooi's honest opinion at that point of time. The words were not used in the sense as submitted by the defendants.

In fact, in another part of the recording, Dr Ooi said that 'it can be safe and it can also be not safe' and he had also conveyed on the need to be supplied with more documents and to have a second site visit before he can finalise his report. Dr Ooi additionally emphasised that the methodology of the construction and the PowerPoint presentation by the parties scheduled for 11 December 2020 are very important. These are indicators that Dr Ooi remained open-minded and has not formed any conclusive views on the proposed project at the material time;

(c) the reference to other 'far-off' areas:

I am unable to agree with the defendants that Dr Ooi has made a pre-judgment on the issue of the stability of the slopes by making reference to areas which are purportedly outside and far-off from the boundaries of the proposed project.

It is perfectly within reason for Dr Ooi to carry out a holistic study and observation of the project site and its surrounding landscape and the slope corridor in question. The findings of the court in the last section of subpara(b) above are also applicable here;

(d) the comments during the site visit on 16 September 2020 on the drainage:

I have perused the affidavits affirmed by the defendants and I am unable to find any averments as to the alleged comments made by Dr Ooi on 16 September 2020 that 'there is no serious environmental issue detected at the project site' which is said to be in conflict with the later statements that there is no maintenance of the existing drainage.

Hence, on the case authorities as cited by the plaintiffs ie *Eng Mee Yong & Ors v v Letchumanan* [1979] 2 MLJ 212, *Bee Ya Hock @ Beh Ah Hock v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* [1994] MLJU 85; [1994] 2 CLJ 753 and *Natsafe (M) Sdn Bhd v Loi Teak Kuong* [2005] 6 MLJ 454; [2005] 2 CLJ 285, this issue is not considered by the court as it is a submission from the bar.

In any event, the condition of the existing drainage at the project site can be seen from the photographs shown by Dr Ooi for the 25 November 2020 presentation (see exhs 'IL76' and 'IL77', encl 191). According to Dr Ooi, the drainage was cleared just before the site visit. This shows that Dr Ooi wants to give an accurate and honest account of the conditions at the site. Surely, this cannot be a ground to seek for his recusal;

(e) the Highland Towers incident:

In para 15 of the AIR (encl 255), the plaintiffs averred that 'Para 5.11 of afidavit sokongan Khoh is not admitted. In any event, the Highland

Tower incident is a case study shared by all experts including the court expert for the benefit of understanding of this Honourable Court and the parties. In fact, the defendants had through their expert, Ir Dr Gue See Sew, made the comparison between the Highland Tower and proposed project in their presentation slides in exh IL115 OF encl 191. Notably, the court expert had also highlighted during the site visit on 16 September 2020 that just like at the proposed project, there was a stream at the site of the Highland Tower incident'.

In my opinion, the above affirmation is sufficient to rebut the defendants' assertions with regards to the Highland Towers incident.

The lessons to be learnt from that national tragedy remain relevant until today. Dr Ooi informed the court during the CM on 11 December 2020 that he had drafted the report on the collapse of Block 1 of the Highland Towers and that the proposed project is the reverse of the development of Highland Towers as the proposed project is at the bottom of the slopes and not at the top. Dr Ooi also said that the issue of drainage is pertinent.

While the defendants' are confident that the proposed project is developed based on solid engineering principles, the matter remains as an unproven statement at this interlocutory stage of proceedings; and

(f) the purported opinion on Phase 1 of the proposed project:

I have similarly perused the affidavits affirmed by the defendants and as pointed out by the plaintiffs, this factual allegation was not raised in any of the affidavits. This issue is therefore disregarded by the court on the same ground as set out in subpara (d) above.

Whether there is unexplained delay on the part of the defendants in filing the recusal application

Whether any purported bias has been waived by delay, non-protestation and positive acts by the defendants

[156] Before I end this judgment, there is a final point that I need to address for the sake of completeness. The learned counsel for the plaintiffs had argued that the defendants had only filed the recusal application on 10 March 2020 which is:

(a) more than seven 1/2 months after the order dated 17 July 2020 appointing the court expert by consent of the parties;

(b) more than five 1/2 months after the site visit on 16 September 2020;

(c) three 1/2 months after the 25 November 2020 presentation;

(d) two months after the presentation by the defendants' experts on 11 January 2021;

(e) more than one 1/2 months after the order dated 18 January 2021 on the scope of tasks of the court expert; and

(f) after seven CMs involving the court expert,

whereas the defendants contended that the purported bias arose from the 25 November 2020 presentation. However, there was no protestation by the defendants throughout the proceedings on 25 November 2020 and they had taken positive acts in affirming the appointment of Dr Ooi as the court expert as listed in para 37 of the plaintiffs' written submission.

[157] It was further submitted that all these acts point towards an affirmation of Dr Ooi's appointment as the court expert and an absence of bias. There was not an inkling of any grievance over the alleged bias which now alleged to have been manifested on 25 November 2020.

[158] The defendants retort was that they had made known their objections to certain parts of the draft scope of tasks while it was being finalised and with regards to the excessive fees imposed by the court expert. In other words, the defendants' submissions are a rehash of what was submitted earlier.

[159] I have considered the plaintiffs' arguments and find that they stand on solid footing. The defendants had many opportunities to raise the issue of bias but they did not. Instead, the defendants took positive steps opposite to the presence of any bias by the court expert.

[160] As a consequence of the unexplained delay, the non-protestation and the positive acts by the defendants, any bias on the part of the court expert, if it exists, has been waived by the defendants (see the decisions of the Federal Court in *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673 the English Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd & other appeals* [2000] 1 All ER 65 the Supreme Court of India in *Manak Lal v Dr Prem Chand* AIR 1957 SC 425 the High Court of Australia in *Vakauta v Kelly* [1989] 167 CLR 568 and *Smits v Roach* [2006] 227 CLR 423 the Family Court of Australia in *Neil v Zang* [2021] FamCAFC 30 and the Court of Appeal of New Zealand in *Auckland Casino Ltd v Casino Central Authority* [1995] 1 NZLR 142).

Conclusion

[161] The accusations made by the defendants against the court expert in the recusal application are very serious indeed; they could potentially affect his reputation and professional integrity.

[162] The law mandates that a party raising an allegation of bias must show cogent evidence. Whimsical or bare imputations of bias are insufficient but this is exactly the scenario in this case. The recusal application was evidently based on unfounded inferences, conjecture and suspicion.

[163] The defendants are reminded that the court expert was appointed for the purpose of providing his professional, independent and impartial assessment on matters pertaining to the proposed project, and not to pursue the cause of the plaintiffs or the defendants. In *Ho Hau Wong & Ors v Tan Kim Chuan & Ors* [2018] MLRHU 807, the High Court referred to the decisions in *Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd* [1992] 2 MLJ 233; [1992] 3 CLJ 1539 and *Cassin v Richardson* [2006] NZFLR 1068 in concluding that the appointment of the receiver as an expert was made by the court pursuant to O 40 of the ROC 2012 and by virtue of this, the receiver was first and foremost officers of the court and are only beholden to the court.

[164] I have no doubt whatsoever that Dr Ooi is aware of, and understands, the responsibilities that ensue from his appointment as the court expert. The recusal application is nothing but a baseless attack on the integrity of the court expert. Hence, the defendants' proposition that the scope of tasks is not to be adopted and performance of the same ought to be halted simply do not arise.

[165] The defendants' application is encl 228 was therefore dismissed.

[166] On the issue of costs, the plaintiffs' counsel prayed for RM30,000 premised on O 59 rr 8 and 16 of the ROC 2012 and due to the complexity of the matters which needed to be addressed especially on the test of real danger of bias. Research had to be carried out on foreign cases and extra effort was required because the defendants changed the grounds of the application over time. The recording of the court proceedings on 25 November 2020 was transcribed by the plaintiffs when it should have been the defendants.

[167] The learned counsel urged the court to order that costs be paid forthwith in line with O 59 r 5 of the ROC 2012 in view of the defendants' conduct whereby on 30 June 2021, Dato' Jasbeer had conceded that the alleged bias was apparent on 25 November 2020 but there was delay in filing the recusal application and no explanation was given for the same. Reference was made to O 59 r 7(1) in submitting that these are relevant factors to be considered in determining the amount of costs.

[168] The defendants' counsel emphasised that the recusal application is a normal application and he strongly disagreed that misconduct and the other

allegations can be made just because the recusal application was filed. To him, costs in the region of RM5,000 and RM10,000 would be reasonable as this is, after all, an interlocutory application.

[169] On this point, the court agreed with the defendants' counsel and hence, costs of RM8,000 was ordered to be paid forthwith by the defendants to the plaintiffs, subject to allocatur.

Enclosure 65 dismissed with costs of RM10,000 to be paid by defendants to plaintiffs subject to allocatur. Enclosure 4 allowed with costs of RM30,000 to be paid by defendants to plaintiffs subject to allocatur. Enclosure 228 dismissed with costs of RM8,000 to be paid by defendants to plaintiffs subject to allocatur.

Reported by Dzulqarnain Ab Fatar